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No. 22607

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ATHALIE IRVINE SMITH,

Appellant,

vs.

THE JAMES IRVINE FOUNDATION, a corporation, *et al.*,

Appellees.

Appeal From the United States District Court
Central District of California.

BRIEF FOR APPELLANT.

FILED

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MAY 31 1968

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vs.

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Appellees.

**Appeal From the United States District Court
Central District of California.**

BRIEF FOR APPELLANT.

Jurisdictional Statement.

This is an appeal from a judgment entered on December 18, 1967, by the United States District Court for the Central District of California [R. 189, 190].

Notice of Appeal was filed by plaintiff Athalie Irvine Smith on December 18, 1967 [R. 187, 188]. Pleadings in the District Court consist of: Amended complaint of plaintiff [R. 4 to 29]; answer of the respective defendants to plaintiff's amended complaint [R. 46 to 78; R. 79 to 85; R. 110-A to 110-F; R. 111 to 115; R. 116 to 121; R. 122 to 129]; reply of plaintiff to affirmative defenses contained in defendants' answers [R. 86 to 104; R. 105 to 107; and R. 130 to 134].

Athalie Irvine Smith, plaintiff in said action in the District Court, is an heir at law and a beneficiary under the will of James Irvine, deceased, who was plaintiff's paternal grandfather. Said action was commenced August 10, 1966. Plaintiff alleged in said amended complaint that the indenture of trust executed by James Irvine, as trustor, and The James Irvine Foundation, as trustee, on February 24, 1937, was invalid or void, and that the 510 shares of the corporate stock of The Irvine Company, the corpus described in said indenture of trust, belonged to the heirs of James Irvine, deceased, or the beneficiaries under the will of said decedent.

The District Court's jurisdiction was invoked under 28 U.S.C., Sec. 1332, and is based upon diversity of citizenship. Plaintiff is a citizen of the State of Virginia. All of the defendants for federal court jurisdictional purposes are citizens of the State of California [R. 139].

The value of 459 shares of stock in The Irvine Company involved in the plaintiff's action exceeded 100 million dollars.

This court's jurisdiction rests upon 28 U.S.C., Sec. 1291.

Pursuant to stipulation of all parties to this appeal and by order of this court, appellant has to June 1, 1968 to file appellant's brief; appellees have to August 1, 1968 to file appellees' brief; and appellant has to August 20, 1968 to file appellant's reply brief.

Statement of Plaintiff's Case and Plaintiff's Contentions in the District Court, and Points, Issues and Questions Involved in Plaintiff's Appeal.

Plaintiff and appellant Athalie Irvine Smith contends that the trust created by the indenture of trust executed on February 24, 1937 was illegal and void and as such either no title passed to The James Irvine Foundation, as trustee, or there was a resulting trust in favor of the trustor James Irvine as resulting trust beneficiary, and since his death for his heirs.

The trust was illegal and void because:

1. The trust was not a legally charitable trust because it provided in part for distribution of income for purposes not public and charitable but private and non-charitable and also for purposes and uses of the trust income in the absolute discretion of the trustee that may be either private or charitable, all to be paid from the total income from the same trust corpus during the same period of time, and no means were provided or legally possible for separation or division or allocation between charitable and non-charitable purposes. The trust was solely an income trust.

2. The trust was illegal because it provided for the corpus of the trust property (the Irvine Company stock) to be held in trust in perpetuity (forever) and the beneficial interest was never to vest in any beneficiary, and its purposes were not legally charitable. The trust was, therefore, prohibited by Article XX, Section 9, of the California Constitution, which reads:

“No perpetuities shall be allowed except for eleemosynary purposes.”

3. The trust was illegal because it provided for distribution of income possible to vest in the future beyond the period of time allowed by the rule against perpetuities, and for purposes not legally charitable, and the trust therefore was prohibited by the above described provision of the California Constitution.

4. The trust was illegal and void because it provided that the corpus of the trust property (Irvine Company stock) was never to be alienated except in exchange for other property or funds to become part of the same trust *res*, and its purposes were not legally charitable, and the trust therefore violated California Civil Code, Sections 715, 716 and 771 and was illegal and void as in restraint of alienation.

5. The trust was illegal and void because it provided for the holding of property and the distribution of income for purposes not legally charitable beyond the period of time permitted as legal as provided in California Civil Code, Sections 715, 716 and 771.

6. The trust was an express trust and in its entirety was illegal and void, and because thereof there was a resulting trust in favor of the trustor (the real owner as the resulting trust beneficiary), and after his death in favor of his heirs, to wit, the plaintiff and her three cousins Kathryn Lillard Wheeler, Linda Irvine Gaede and James Myford Irvine as the surviving heirs of James Irvine, Deceased. The trust was an express trust and was always recognized as such by The James Irvine Foundation, as trustee, and therefore it was never repudiated by said trustee. Said defendant Foundation, as trustee, could never get title so long as it always claimed to hold the Irvine stock for the benefit of others and never adversely for itself.

7. James Irvine, as trustor, had no intention of divesting himself of the title to or the control or dominion over the 510 shares of the Irvine Company stock during his lifetime.

8. James Irvine never intended that the title to the Irvine Company stock would pass *in praesenti* to The James Irvine Foundation, as trustee.

9. There was no effective delivery of the Irvine stock or the indenture of trust to The James Irvine Foundation, as trustee, during the lifetime of James Irvine.

10. The purported delivery of the Irvine Company stock and/or the indenture of trust was ineffective because said trust was testamentary and not intended by James Irvine to be effective or operative or absolute until after his death.

11. The trust was illusory and therefore void.

12. The 1937 indenture of trust created a mere agency and not a true trust.

13. The transfer in trust was colorable.

14. James Irvine, the trustor, died intestate as to the 510 shares of Irvine stock and it was the expressed intention of James Irvine that the Irvine stock *would not* be included under the provisions of his last will.

15. The last will of James Irvine, in the omnibus residuary clause thereof, provided in effect that in the event the trust was held illegal and void the Irvine stock shall be distributed to the plaintiff and the other heirs at law of James Irvine, Deceased.

16. The trust was mixed and contained both charitable and non-charitable provisions which are so blended together as to be inseparable, and the trust is therefore illegal and void.

17. The trust was an attempted testamentary disposition of the Irvine stock by the trustor (owner) James Irvine, and is therefore illegal and void.

In compliance with Rule 18, Subparagraph C, the foregoing points, issues and questions that are involved in this appeal, and the record references supporting each statement of fact and the evidence in support thereof and the applicable law thereto, will be fully set forth under the appropriate chapters of this brief.

Specification of Errors Relied Upon.

1. The District Court erred in granting judgment for defendants [R. 189-190].

2. The District Court erred in dismissing plaintiff's amended complaint with prejudice [R. 189-190].

3. The District Court erred in entering judgment "that the indenture of trust dated February 24, 1937 established a valid trust for charitable purposes" [R. 189-190].

4. The District Court erred in entering judgment "that The James Irvine Foundation, as trustee of that trust, has valid title to 459 shares of stock of The Irvine Company" [R. 189-190].

5. The District Court erred in entering judgment "that none of the heirs-at-law of James Irvine and none of the beneficiaries under his will have any right or title to, or any interest in, those shares" [R. 189-190].

6. The District Court erred in entering judgment "that the plaintiff's amended complaint be and the

same is hereby dismissed with prejudice; and that final judgment herein be and the same is hereby rendered in favor of the defendants" [R. 189-190].

7. The District Court erred in entering judgment "that the taxable costs of the action be and they are hereby assessed against the plaintiff." [R. 189-190].

8. The District Court erred in concluding that "under the indenture of trust dated February 24, 1937 a valid trust for charitable purposes was established" [R. 185].

9. The District Court erred in concluding that "The James Irvine Foundation, as trustee of that trust, has valid title to 459 shares of stock of The Irvine Company" [R. 185].

10. The District Court erred in concluding that "none of the heirs at law of James Irvine and none of the beneficiaries under the will have any right or title to, or any interest in, those shares" [R. 185].

11. The District Court erred in ordering that judgment shall be entered "Adjudging that the indenture of trust dated February 24, 1937, established a valid trust for charitable purposes" [R. 185].

12. The District Court erred in ordering that judgment shall be entered "adjudging that The James Irvine Foundation as trustee of that trust has valid title to 459 shares of stock of The Irvine Company." [R. 185].

13. The District Court erred in ordering that judgment shall be entered "adjudging that none of the heirs at law of James Irvine and none of the beneficiaries

under his will have any right or title to, or any interest in, those shares.” [R. 186].

14. The District Court erred in ordering that judgment shall be entered “Dismissing the plaintiff’s amended complaint with prejudice and rendering final judgment herein in favor of defendants” [R. 186].

15. The District Court erred in ordering that judgment shall be entered “Assessing the taxable costs of this action against the plaintiff” [R. 186].

16. The findings of fact of the District Court are clearly erroneous [R. 137-186, incl.].

17. The District Court erred in sustaining the objections of the defendants that the court was not required or should not take judicial notice of the Report to Subcommittee Chairman’s Report to Subcommittee No. 1, Select Committee on Small Business, House of Representatives, Ninetieth Congress, entitled Tax Exempt Foundations and Charitable Trusts: Impact on our Economy, Fifth Installment, Dated April 28, 1967, and containing 1129 pages devoted exclusively to the investigation of The James Irvine Foundation, as trustee, by said Congressional Committee, which said report was filed with the District Court by the plaintiff upon the ground that the court was required to take judicial notice of the contents of said report [R. 135, 136].

The Findings of Fact Made by the District Court Are Contained in the Memorandum of Said Court [R. 137-186], but Said Findings Are Not Numbered, Therefore the Same Will Be Referred to by the Page Numbers of the Record Filed Herein on Which Said Findings Are Set Forth as Follows:

1. The finding of fact of the District Court that on November 7, 1947, following the death of James Irvine, E. M. Price, as the secretary and treasurer of The James Irvine Foundation, as trustee, sent in for transfer to the Foundation, as trustee, the certificates of Irvine Company stock described in said finding, is clearly erroneous [R. 155; R. 167].

Argument.

This finding states that said certificates of Irvine Company stock were sent by E. M. Price in her capacity as secretary and treasurer of The James Irvine Foundation, as trustee, to the Irvine Company for transfer to the Irvine Foundation, as trustee, whereas the only evidence in the record concerning said purported transfer is Exhibit D-2 [Tr. 2328], the letter dated November 7, 1947 from E. M. Price to Mr. Hellis, secretary of the Irvine Company, which letter is on the stationery letterhead of the Estate of James Irvine, 820 Crocker Building, San Francisco, and is signed by E. M. Price, secretary, which is the capacity in which E. M. Price sent said letter, to wit, secretary to the executors of the Estate of James Irvine. There is no evidence that E. M. Price was acting in her post mortem capacity as secretary and treasurer of The

James Irvine Foundation, as trustee. E. M. Price on November 7, 1947 continued to hold said Irvine Company stock certificates described in said letter in the safe of James Irvine that was located in the office of James Irvine, exactly as she and James Irvine had done for the previous ten years during the lifetime of Mr. Irvine when E. M. Price was Mr. Irvine's secretary and agent and his "dummy" secretary-treasurer of his *alter ego* The James Irvine Foundation. On November 7, 1947, said Irvine Foundation, as trustee, had not yet received the delivery or the possession of said Irvine Company stock certificates for the reason that the possession thereof and the title thereto was physically and as a matter of law vested in the executors of the decedent James Irvine, to wit, Myford Irvine, his son, Mrs. Katharine Brown Irvine, his widow, and Robert H. Gerdes, his attorney. Their secretary and agent was E. M. Price, and she acted for the executors in the same capacity in which she had served James Irvine as secretary and agent during his lifetime. The said executors of the Estate of James Irvine stepped into the shoes of the decedent James Irvine and took possession of all of the assets of said decedent, including the 510 shares of the Irvine Company stock, and E. M. Price merely changed her title and her position to secretary to said executors from that of secretary to James Irvine during his lifetime.

2. The implied finding of fact of the District Court that said Irvine Company stock certificates were accompanied by the consents of the inheritance tax departments of the State of California and the State of West Virginia and that said consents expressly authorized the transfer of said stock certificates from the name of the decedent James Irvine to the name of The James Irvine Foundation, as trustee, is clearly erroneous [R. 155].

Argument.

The consent of the Controller of the State of California dated November 5, 1947 [Ex. B-7, Tr. 2081] is directed to The Irvine Company and merely states, "In re James Irvine, Deceased, pursuant to Article 30 page 968 of Section 2 of the Revenue and Taxation Code, the Controller of the State of California and the Treasurer of the City and County of San Francisco do hereby consent to the transfer of 510 shares of the stock of your company now standing in the name of the above decedent". Said consent does not direct or authorize the executors or The Irvine Company to transfer any certificates of its stock to The James Irvine Foundation or any other identified individual or corporation, and said consent further indicated that said stock was an asset of James Irvine, Deceased, and stood in the name of said decedent. This is merely a formal printed release which authorized the transfer of said stock as an asset of James Irvine, Deceased, and does not have any effect whatever upon the title to said stock as being vested in The James Irvine Foundation. It merely released the transfer of said stock from the lien of the Controller of the State of California whenever the court ordered the transfer, and is commonly issued in any estate where it appears that the remaining assets in the estate are sufficient to pay the inheritance taxes due the State of California, which was no problem in the Estate of James Irvine because said remaining assets of said estate were appraised at approximately 8 million dollars [Ex. B-15, Tr. 2084].

The James Irvine Foundation, as trustee, under the indenture of trust dated February 24, 1937 [Ex. A-1, Tr. 3674], was a complete stranger to the Estate of James Irvine, Deceased. The above named executors of the Irvine Estate stood in a conflict of interest position

because they were simultaneously directors, members and trustees of The James Irvine Foundation. Said executors acted illegally in transferring said Irvine Company stock from the Estate of James Irvine to The James Irvine Foundation.

The executors had no authority to transfer said Irvine Company stock from the Estate of James Irvine to said Foundation unless ordered to do so by the court through a judgment entered in an adversary proceeding by said Irvine Foundation against said executors of the Estate of James Irvine, Deceased. See the following authorities:

Auslen, et al. v. Superior Court, 27 Cal. Rptr. 8;

Crocker First Nat. Bank of S. F. v. Horgan, 74 Cal. App. 2d 917; 170 P. 2d 115;

Roberts v. Roberts, U.S. Court of Appeals (9th Cir.), 286 F. 2d 647;

Tooley v. Commissioner of Internal Revenue (U.S. Court of Appeals 9th Cir.), 121 Fed. Rptr. 2d 350.

Neither does the certificate of consent of the tax commissioner of the State of West Virginia [Ex. B-5, Tr. 2081] authorize the transfer of the Irvine Company stock certificates to The James Irvine Foundation, as trustee. It is merely a consent to the transfer of said Irvine Company stock certificates and is restricted to the personal representatives of said estate or to such person or persons as may be designated by said representatives. Again, this consent has no relationship whatever to the title to the Irvine Company stock being vested in The James Irvine Foundation, as trustee, prior to the death of James Irvine. The Irvine Company stock certificates were not transferred

on the books of The Irvine Company from the name of James Irvine to the name of The James Irvine Foundation until November 18, 1947 [Ex. D-1, Tr. 2325].

3. The finding of fact of the District Court that the record is silent as to the facts and circumstances which surrounded the surrender of certificates Nos. 33 and 42 for 132 shares and 41 shares, respectively, of Irvine Company stock on April 21, 1941 and the issuance of seven new certificates by The Irvine Company to James Irvine for a total of 173 shares of Irvine Company stock in lieu thereof, is clearly erroneous [R. 165].

Argument.

The substantial evidence in the case with reference to the possession of said certificates Nos. 33 and 42 is that on April 21, 1941 Mr. Irvine personally surrendered both of said certificates to the Irvine Company and new certificates Nos. 45, 46, 47 and 48 for 10 shares each, certificates Nos. 49 and 50 for 5 shares each, and certificate No. 51 for 132 shares, a total of 173 shares, were issued to and received by James Irvine personally. Contrary to said finding that the record is silent concerning the circumstances surrounding the surrender of said certificates Nos. 33 and 42, and the issuance of said new certificates above described, the substantial evidence which is uncontradicted consists of plaintiff's Exhibit 11 [Tr. 3650], which contains copies of all of the stock certificates of The Irvine Company, and the stockholders certificate record showing the stockholders' names and the numbers of the certificates and the amount of shares owned by each stockholder. This plaintiff's Exhibit 11 discloses at the bottom of page 4 of the stockholders

certificate record that on April 21, 1941, James Irvine personally surrendered certificate No. 33 for 132 shares of Irvine Company stock. From a comparison of the signature of "James Irvine" with several other signatures of James Irvine on said stockholders certificate record sheets it is obvious that Mr. Irvine personally surrendered said stock certificate No. 33. On page 6 of said stockholders certificate record appears an entry which shows that on April 21, 1941, James Irvine personally surrendered certificate No. 42 for 41 shares of Irvine Company stock as here again James Irvine's own signature appears on said stockholders certificate record, and on page 7 of said stockholders certificate record there is a further entry that there were issued to James Irvine on April 21, 1941, certificates Nos. 45, 46, 47, and 48 for 10 shares each, certificates Nos. 49 and 50 for 5 shares each, and on page 9 of said stockholders certificate record appears Certificate No. 51 for 123 shares, a total of 173 shares. Each of the new certificates of Irvine stock above described was issued in the name of James Irvine on April 21, 1941, and each was signed by James Irvine as president of The Irvine Company. The substantial evidence is that on April 26, 1941 James Irvine was present at his home in Tustin, Orange County, California, and that on said date he attended a special meeting of the board of directors of The Irvine Company that was held at the office of the company near Tustin, California. It is therefore conclusive that James Irvine was present in person and personally surrendered certificates Nos. 33 and 42 to The Irvine Company on April 21, 1941, and personally received in lieu thereof the new certificates which were issued on the same date, to wit, April 21, 1941 [Ex. 2, Tr. 3647]. The fact that Mr. Irvine broke certificates 33 and 42 into 7 new certifi-

cates in denominations as small as 5 and 10 shares on April 21, 1941, is substantial evidence that he never intended that the title to Irvine stock certificates 33 and 42 passed to The Irvine Foundation as trustee *in praesenti*. Furthermore, the possession by Mr. Irvine of certificates 33 and 42 on April 21, 1941, also supports the contention of the plaintiff that Mr. Irvine during his entire lifetime had the possession either personally or through his agent, E. M. Price, of all of said three certificates Nos. 28, 33 and 42 for the 505 shares of Irvine stock that are described in the indenture of trust.

There is no evidence whatever that any of the above described certificates were ever delivered at any time by Mr. Irvine to either Myford Irvine or E. M. Price, as president and secretary, respectively, of the Irvine Foundation, as trustee, during Mr. Irvine's lifetime; and if they had been delivered by him to said parties such delivery would have been under the same circumstances as the alleged original delivery of certificates Nos. 28, 33 and 42, to wit, as employees and agents of James Irvine and his "dummy" officers of the Foundation corporation. The further substantial evidence which is undisputed is defendants' Exhibit D-2 [Tr. 2328], a letter dated November 7, 1947 from E. M. Price to Mr. Hellis, as secretary of The Irvine Company, which letter discloses that E. M. Price, as secretary to the executors of the Estate of James Irvine, had the possession of all of the Irvine Company certificates of stock described in said letter and which totaled 510 shares, on November 7, 1947. The evidence in the case is conclusive that from the time it is alleged by The James Irvine Foundation that The Irvine Company stock was delivered in 1937, whether the same was allegedly delivered to Myford Irvine as "dummy" presi-

dent, or to E. M. Price as “dummy”, secretary-treasurer of the Irvine Foundation, said Irvine Company stock so allegedly delivered to them was delivered to them in their capacity as employees and agents of James Irvine and as a depositary. Under these circumstances the Irvine Company stock at all times subsequent to 1937 remained in the possession of James Irvine and /or E. M. Price as his agent and was kept in the safe located in the office of James Irvine during his entire lifetime. After the death of Mr. Irvine on August 24, 1947 said Irvine Company stock continued to remain in the agency custody of E. M. Price as secretary to the executors of the Irvine estate [Ex. D-2, Tr. 2328]. There is no substantial evidence in the record that established that at any time during the lifetime of Mr. Irvine or after his death did said certificates of Irvine Company stock ever leave the possession of Mr. Irvine and/or his agent E. M. Price until November 7, 1947. No matter how many hats Myford Irvine or E. M. Price wore to represent the interests of James Irvine in his various enterprises and corporations, including his *alter ego* The James Irvine Foundation, they held their offices and titles as the “dummies” and “tools” of their employer James Irvine, and as the agents of James Irvine said parties were at all times subject to his dominion and control.

4. The finding of fact of the District Court that for the sole and restricted purpose of control of The Irvine Company, in connection with salaries voted the officers and for all other income tax purposes, James Irvine would be regarded *only* by the Internal Revenue Service as the owner of 510 shares of Irvine stock, is clearly erroneous [R. 164; R. 166; R. 167].

Argument.

There is no evidence whatever to support this finding and both the Federal and California income tax returns of The Irvine Company were sworn to by either James Irvine, as president, or by some other executive of The Irvine Company, and were based upon the records of both The Irvine Company and James Irvine [Ex. 3, Tr. 3647]. This representation of stock ownership is unqualified and means exactly what it states: That James Irvine was the owner of 547 shares of Irvine Company stock. The 510 shares of Irvine Company stock that are involved in this case were included in said figure of 547 shares. No regulations or instructions of the Internal Revenue Service were introduced in evidence, or even exist that support said finding. Furthermore, said finding completely disregards the substantial evidence in the case that, in addition to the representation in the income tax returns schedules "F" and "G" of the absolute ownership of 547 shares of Irvine Company stock by James Irvine, there was also the voluntary declaration of James Irvine that was set forth in the balance sheets attached to each of said income tax returns during said 10-year period, as follows:

"Ownership of company stock. James Irvine owns 547 shares out of a total of 1,000 shares outstanding. This stock was acquired in 1894 and his return is filed in San Francisco where he resides."

The above described documentary evidence is further implemented by the minutes of the annual stockholders meetings of The Irvine Company during said 10-year period which disclose that James Irvine was the owner of 547 shares of Irvine Company stock during said 10-year period, and said minutes further disclose that when James Irvine did not attend any one of said annual stockholders meetings that the said 547 shares of

Irvine Company stock were voted under a written proxy signed by James Irvine, which stated that James Irvine was the owner and held 547 shares of Irvine Company stock [Ex. 2, Tr. 3647.]

5. The finding of fact of the District Court that James Irvine could not have voted the Irvine Company stock involved in the plaintiff's action if said Irvine Company stock had been transferred on the books of The Irvine Company to The James Irvine Foundation, as trustee, is clearly erroneous [R. 166].

Argument.

There is no evidence to support this finding that James Irvine could not have voted The Irvine Company stock if said stock had been transferred on the books of The Irvine Company to the Irvine Foundation, as trustee. The indenture of trust expressly reserved the right to Mr. Irvine to vote the Irvine company stock during his lifetime, which provision in itself constituted a written proxy to Mr. Irvine to vote the 510 shares of Irvine Company stock had said Irvine Company stock been effectively delivered to the Irvine Foundation, as trustee, during the lifetime of James Irvine, and a copy of the indenture of trust had been filed with The Irvine Company.

The substantial evidence established the nondelivery of either the Irvine Company stock or the indenture of trust by James Irvine during his lifetime, otherwise a copy of said indenture of trust would have been filed with The Irvine Company regardless of whether or not the Irvine Company stock certificates were transferred from the name of James Irvine to the name of The James Irvine Foundation, as trustee. The undisputed evidence is that a copy of said indenture of trust was never filed with The Irvine Company until November 13, 1947 [Ex. D-3, Tr. 2937], ten weeks after the death of James Irvine and it is obvious

that said document was not filed during the lifetime of Mr. Irvine with The Irvine Company because said trust was not absolute or operative or effective during his lifetime. Had the title to said stock been transferred by James Irvine during his lifetime to The James Irvine Foundation, as trustee, there is no reason why said trustee would not have caused the stock certificates to be surrendered to The Irvine Company and reissued in the name of said trustee. There is no provision in the indenture of trust which prohibited the trustee from having done so. Under similar circumstances where Mr. Irvine held the plaintiff's 200 shares of Irvine Company stock, as trustee, from 1935 to August 24, 1947, the date of his death, the plaintiff's certificate of stock was issued in the name of James Irvine, as trustee, for Athalie Anita Irvine, and in 1935, when Mr. Irvine established himself as trustee under an indenture of trust that involved 50 shares of Irvine Company stock that he gave to his granddaughter Kathryn Lillard, he followed the same procedure as he did with his granddaughter Athalie Anita Irvine, the plaintiff, and had a certificate for 50 shares of Irvine Company stock issued in his name as trustee for Kathryn Lillard [Ex. 11, Tr. 3650]. The conclusion to be drawn from these circumstances is that the reason neither James Irvine never transferred said 510 shares of Irvine stock to the name of the Irvine Foundation, as trustee, and the only reason that a copy of the indenture of trust was not filed with The Irvine Company, or with the United States Treasury Department during the lifetime of Mr. Irvine was solely because the trust was not to be absolute or operative or effective during the lifetime of James Irvine.

In connection with this finding it is also significant to note that in Exhibit D-3 [Tr. 2937], the letter dated November 13, 1947 on the letterhead stationery of the Estate of James Irvine, from E. M.

Price, as Secretary of the executors of the Estate of James Irvine, to Mr. Hellis, secretary of The Irvine Company, that E. M. Price sends "A True Copy" of the 1937 indenture of trust and a copy of Mr. Irvine's letter dated June 20, 1946 to Mr. Hellis [Ex. A-13, Tr. 3678], which letter of June 20, 1946 refers to five shares of Irvine Company stock. Prior to the sending to The Irvine Company on November 13, 1947, of a copy of the indenture of trust and a copy of Mr. Irvine's letter dated June 20, 1946, no notice was ever given to The Irvine Company that either of said documents or said letter existed, and the records of The Irvine Company, which were under the domination and control of James Irvine, therefore did not contain an entry concerning the purported transfer of the Irvine Company stock by Mr. Irvine to the Irvine Foundation, as trustee. Had this trust transaction been intended by Mr. Irvine to be absolute and operative during his lifetime why did he not follow the same pattern and procedure as he had with the plaintiff's 200 shares of stock, and the 50 shares of stock of Kathryn Lillard which he held as trustee, and had recorded with The Irvine Company notice of the existence of both of said trusts and had the respective certificates of stock issued in his name as trustee. E. M. Price, who was the confidential secretary and agent of Mr. Irvine, as well as his agent and "dummy" secretary and treasurer of the Irvine Foundation, as trustee, knew that Mr. Irvine never intended that said trust would be complete, absolute or operative or effective during the lifetime of Mr. Irvine, and that is the reason that E. M. Price, as the employee and agent of James Irvine, had access to and the custody of the 510 shares of Irvine Company stock and the indenture of trust during the lifetime of James Irvine and following his death, and kept both the stock and the indenture of trust in Mr. Irvine's safe that was located

in the private office of Mr. Irvine. Under these circumstances any possession of the Irvine stock and/or the indenture of trust by E. M. Price would be legally the possession of her employer James Irvine. After the death of Mr. Irvine the possession of said Irvine Company stock and the indenture of trust continued to be accessible to and held by E. M. Price as the secretary of the executors of the estate of James Irvine, Deceased, until November 7, 1947 when she, as such secretary to said executors, sent the certificates representing said 510 shares of Irvine Company stock to The Irvine Company for transfer from the name of James Irvine to the name of The James Irvine Foundation. It will be recalled that the letter of E. M. Price [Ex. D-2, Tr. 3528] dated November 7, 1947, was on the stationery letterhead of the Estate of James Irvine and was signed by E. M. Price as secretary, which was in her capacity as secretary to the executors of the Irvine estate, and said letter was not signed by her, as stated in the finding of the District Court, as secretary and treasurer of The James Irvine Foundation.

6. The finding of fact of the District Court that the indenture of trust was not found in the safe deposit boxes of James Irvine at the time of his death and that there is lacking any evidence showing the possession of the indenture of trust by James Irvine following its execution and/or that said indenture of trust was in the possession of the Foundation at all times before and shortly following the death of James Irvine on August 24, 1947, is clearly erroneous [R. 166-167].

Argument.

There is no evidence in the case whatever to support this implied finding that James Irvine at any time effectively delivered the indenture of trust.

Neither N. Loyall McLaren nor Robert H. Gerdes, the only witnesses who testified to the alleged conversations with Mr. Irvine concerning the delivery of the Irvine Company stock, made any mention at all about any conversation with James Irvine concerning the delivery of the indenture of trust. The only evidence introduced by the defendants concerning the possession of said indenture of trust consists of the minutes of a special meeting of the directors of the Irvine Foundation that was held on September 19, 1947, following the death of Mr. Irvine on August 24, 1947 [Ex. A-14, Tr. 3678]. These minutes disclosed that at this meeting the indenture of trust was in the possession of E. M. Price. The inference to be drawn from said minutes is that E. M. Price, as the confidential secretary and agent of James Irvine, had kept said indenture of trust in the safe at Mr. Irvine's office where she had also kept the Irvine Company stock certificates, and that her possession of the Irvine Company stock and/or the indenture of trust, as the agent of Mr. Irvine during his lifetime, continued as the agent of the executors of the Estate of James Irvine after he died, which inference is supported by Exhibits D-2 [Tr. 2328] and D-3 [Tr. 2937], the letters from E. M. Price to Mr. Hellis, as secretary of The Irvine Company, dated respectively November 7, 1947 and November 13, 1947. Both of said letters were on the stationery letterhead of the Estate of James Irvine and signed by E. M. Price as secretary to said executors, and not as secretary of The James Irvine Foundation. It was also E. M. Price, as such secretary to said executors who, in her letter of November 13, 1947 [Ex. D-3, Tr. 2937], sent a copy of the indenture of trust to Mr. Hellis as secretary of The Irvine Company, and in said letter stated that the filing of said copy of said indenture of trust consists of said indenture of trust with The Irvine Company *completed this transaction*, which transaction meant the

vesting of the title of the Irvine Company stock for the first time in The James Irvine Foundation, as trustee, as provided in paragraph 3 of the indenture of trust which expressly stated that such title did not vest until after the death of James Irvine [Ex. A-1, Tr. 3674].

Furthermore, the burden was on the defendant The James Irvine Foundation to establish not only by the substantial evidence, but further by the unequivocal and clear convincing evidence that said indenture of trust was effectively delivered by Mr. Irvine to the Irvine Foundation, as trustee, immediately upon the signing thereof.

See the following authorities:

Lawson v. Lowengart, 251 A.C.A. 98; 59 Cal. Rptr. 186;

Estate of Albert, 38 Cal. App. 2d 46; 100 P. 2d 538;

Monell v. College of Physicians & Surg., 198 Cal. App. 2d 38; 17 Cal. Rptr. 744;

Blonde v. Estate of Jenkins, 130 Cal. App. 2d 682; 281 P. 2d 214;

Sullivan v. Shea, 32 Cal. App. 369; 162 Pac. 925;

Donegan v. Hibernia S & L Soc., 127 Cal. 137; 50 Pac. 389;

Humble v. Gay, 168 Cal. 516; 143 Pac. 778;

Atlantic Nat. Bk of Jacksonville, Fla. v. St. Louis Union Trust Co., 211 S.W. Rptr. 2d 6;

Bogert—Trusts, 2d Ed., Sec. 49, p. 391.

7. The finding of fact of the District Court that the indenture of trust was not found in the safe deposit boxes of James Irvine following his death, is clearly erroneous [R. 167].

8. The finding of fact of the District Court that there is lacking any evidence showing possession of the indenture of trust by James Irvine following its execution, is clearly erroneous [R. 167].

9. The finding of fact of the District Court that the only possession of the indenture of trust following its execution, as shown by the evidence was the possession of the Foundation shortly following the death of James Irvine, is clearly erroneous [R. 167].

Argument.

The findings of fact of the District Court 7, 8 and 9, are not supported by the substantial evidence. The evidence referred to by the District Court in its finding 6, concerning the indenture of trust not having been found in the safe deposit boxes of James Irvine following his death does not include the only evidence in the case concerning the possession of said indenture of trust, to wit: The evidence that the stock was to be placed with E. M. Price, who was to act as depository, and was to be held by her in the safe in James Irvine's office [Ex. A-16, Tr. 3679], and that E. M. Price had said Irvine indenture of trust at the first meeting of the directors of the Irvine Foundation held on September 19, 1947, almost immediately after the death of James Irvine on August 24, 1947, and according to the minutes of said meeting E. M. Price read the Irvine indenture of trust for the first time to the directors present [Ex. A-14, Tr. 3678]. Said directors meeting was held where it always had been held—in the private office of James Irvine at 820 Crocker Building—the same office in which Mr. Irvine kept his safe. This safe is where said indenture of trust, together with the Irvine Company certificates of stock, were kept by E. M. Price as the confidential secretary and agent of Mr. Irvine during his en-

tire lifetime subsequent to February 24, 1937. There is no other substantial evidence in the case. The above cited authorities also hold that where the possession of the indenture of trust is shown to be in the hands of the trustee for the first time subsequent to the death of the trustor, it makes said alleged possession by the trustee during the lifetime of the trustor highly suspicious and requires that the trustee show by clear and convincing evidence that it did have the possession of said document during the lifetime of the trustor and that the same was delivered to the trustee immediately following the signing thereof and with the intent by the trustor that the title vested immediately.

Lawson v. Lowengart, 251 A.C.A. 98; 59 Cal. Rptr. 186.

10. The finding of fact of the District Court that the evidence preponderates in favor of a finding that the indenture of trust following its execution was delivered to the Foundation by James Irvine and that the indenture of trust was thereafter retained by it is clearly erroneous [R. 168].

Argument.

This finding of fact not only is unsupported by the substantial evidence in the case, but there is no evidence whatever to support said finding.

11. The finding of fact of the District Court that the plaintiff has failed to establish the non-delivery of the certificates for 510 shares of Irvine Company stock by James Irvine to The James Irvine Foundation, as trustee, is clearly erroneous [R. 168].

Argument.

This finding of fact constitutes an improper assignment of this burden to the plaintiff. The James Irvine

Foundation, as trustee, was required to establish by unequivocal, clear and convincing evidence that said indenture of trust and the certificates of Irvine Company stock had been delivered *in praesenti* by James Irvine to the Irvine Foundation, as trustee, and that it was the intention of James Irvine that the title to the Irvine Company stock would vest immediately.

12. The finding of fact of the District Court that the evidence preponderates in favor of a finding that "following the execution of the indenture of trust dated February 24, 1937, and the letter of James Irvine dated June 20, 1946, James Irvine endorsed in blank the certificates described in those instruments and delivered them to the Foundation, and thereafter during the lifetime of James Irvine the Foundation had in its possession certificates for 510 shares of Irvine Company stock or those issued in lieu thereof, endorsed in blank, is clearly erroneous [R. 168].

Argument.

This finding is not supported by the substantial evidence in the case. Insofar as the endorsements in blank of Certificates Nos. 28, 33 and 42 for the original 505 shares of Irvine Company stock that are described in the indenture of trust, the testimony of David A. Black, the handwriting expert, was the only evidence in the case concerning the endorsements by James Irvine on said certificates. Mr. Black testified that certificate No. 28 was endorsed by James Irvine on August 24, 1908, that certificate No. 33 was endorsed on April 17, 1923, and that certificate No. 42 was endorsed after May 29, 1924, and before June 1938 [Tr. 2573-2578, incl.]. Mr. Black was not cross-examined by any of the attorneys for the defendants and his testimony stands in the record uncontradicted.

13. The finding of fact of the District Court that “In paragraph 3 of the indenture of trust it is provided that the income of the trust ‘shall be used, applied and devoted by the Trustee exclusively to or for the advancement of any charitable use or purpose in the State of California,” is clearly erroneous. [R. 170].

Argument.

This finding misquotes the provision of the indenture of trust, which is as follows:

“The *balance* of said income, after the deductions *and investments* hereinabove provided, shall be used, applied and devoted by the trustee exclusively for the advancement of any charitable use or purpose in the State of California,”

and so forth. It is therefore obvious that the balance only of the income that is left over after the income received by the trustee has been or may be invested by the trustee each year in perpetuity, and in such sums, including the whole or any portion of said balances, as the trustee shall in its sole and uncontrolled discretion deem wise and expedient for investment, and which investments shall become a part of the corpus or principal of the trust property and thereupon be frozen in perpetuity from devotion to any charitable purposes or uses. This investment provision in paragraph 2 of the indenture of trust permits the private and non-charitable use of all or some portion of the trust fund income and renders the entire trust void as being in violation of Article XX, Section 9 of the California Constitution, as a perpetuity and in violation of the restraints on alienation as provided in California Civil Code, Sections 715, 717, 749, and 771.

See the following California authorities:

In re Sutro's Estate, 155 Cal. 727; 102 Pac. 920;

In re Kline's Estate, 138 Cal. App. 514; 32 P. 2d 677;

In re Vance's Estate, 118 Cal. App. 163; 4 P. 2d 977;

In re Peabody's Estate, 21 Cal. App. 2d 690; 70 P. 2d 294;

See also the following authorities:

Grigson v. Harding, 114 A. 2d 870;

Goetz v. Old National Bank of Martinsburg, 84 S.E. 2d 759.

14. The finding of fact of the District Court that the direction in the indenture of trust as to the exclusion of assistance to tax supported charities does not have the effect of denying the trust the status of a trust for charitable uses and purposes, is clearly erroneous [R. 171].

Argument.

This finding of the District Court which impliedly holds that the trustee may arbitrarily and in its sole discretion exclude assistance to tax supported charities as provided in the indenture of trust does not effect the validity of the trust for charitable uses and purposes, clearly misapplies the law that is applicable to charitable trusts, which is that public objectives and uses and purposes are fundamental to the validity of a charitable trust. This mandatory provision in the indenture of trust precludes the devotion of any of the trust income to any of the public schools and other public institutions in the State of California which are maintained by taxes paid by the citizens of California for their support. This is clearly a non-charitable provision.

15. The finding of fact of the District Court that it is the theory of the plaintiff that under paragraph 2 of the indenture of trust the Board of Directors of the Foundation, as trustee, may in their uncontrolled discretion continually invest all of the income from the corpus of the trust and hence freeze all such income into the corpus of the trust and hence negate the use of income for charitable uses and purposes, is clearly erroneous [R. 171].

Argument.

It is not the theory of the plaintiff that under paragraph 2 of the indenture of trust that the Board of Directors of the Foundation, as trustee, may in their uncontrolled discretion continually invest the entire income from the corpus of the trust and hence negate the use of the entire trust income for charitable uses and purposes. It is the theory of the plaintiff that paragraph 2 of the indenture of trust "compels" the trustee to use all or any part of the balance of the trust income after the deductions enumerated in paragraph 1, for investment purposes which are private and non-charitable that renders the trust illegal and void as such provision violates the law of perpetuities and the statutes against restraints on alienation of property. It is quite obvious therefore that the entire trust is bad and fails because it is illegal and void by reason of the power vested in the trustee for the non-charitable use of all or part of the income received from dividends on the Irvine stock which is the trust *res*, for investments, which thereupon *ipso facto* become part of the principal or corpus of the trust estate which can never be distributed for charitable purposes, as the trust is solely an income trust.

16. The finding of fact of the District Court that where a trust is established with a charitable corporation as trustee, the provisions in its articles of incorporation

may be applied along with the provisions of the trust instrument to limit the trust to solely charitable purposes, is clearly erroneous.

Argument.

This finding of fact of the District Court is not supported by the case of *Brown v. Memorial National Home Foundation* as cited in support of said finding and said finding is not supported in any other case that has ever been decided in any jurisdiction that is known to appellant. It is basic trust law that an indenture of trust must be interpreted and applied the same as a will that contains trust provisions and in accordance with the provisions thereof, and that the trustee is bound by and must adhere to the directions of the trustor that are set forth in the indenture of trust. No indenture of trust was involved in the above case that was cited by the District Court to support said finding. The Memorial National Home Foundation was organized as a charitable corporation, and therefore its powers and objects and purposes were contained *solely* in its articles of incorporation. In the case of *Davenport v. Davenport Foundation*, 36 Cal. 2d 67; 222 P. 2d 11, where a charitable corporation was trustee under a separate indenture of trust executed by the trustor Davenport, the Supreme Court of California held that the non-charitable provisions contained in the indenture of trust rendered the trust void. Insofar as the interpretation of the Irvine indenture of trust is concerned in this appeal the *Davenport* decision by the Supreme Court is applicable and not the decision of the District Court of Appeal in the *Brown* Case.

17. The finding of fact of the District Court that the incorporation of the Foundation and the execution of the indenture of trust with the Foundation as trustee are closely related, is clearly erroneous [R. 172].

Argument.

This finding is a continuation of the mistake the District Court made with reference to finding 16 [R. 172] where said court stated that the articles of incorporation of the Irvine Foundation may be applied along with the provisions of the Irvine indenture of trust to limit the trust to solely charitable purposes and thereby circumvent the investment mandate that is contained in paragraph 2 of the Irvine indenture of trust. There is no evidence whatever to support this finding, and as a matter of law there is no relationship between the indenture of trust and the articles of incorporation of the Foundation except that under the articles of incorporation the Irvine Foundation is authorized to act as a qualified trustee under an indenture of trust, but insofar as its powers and duties are concerned as such trustee it is bound by the provisions of the indenture of trust and not by the articles of incorporation.

The James Irvine Foundation, a corporation, stands in a fiduciary relationship only under the indenture of trust and at the most, holds the legal title in trust to the Irvine stock subject to the directions contained in the indenture of trust. It has no beneficial interest or title in or to the Irvine stock.

18. The finding of fact of the District Court that the purpose and objective that is stated in the articles of incorporation of the Foundation is to assist California charities, is clearly erroneous [R. 172].

Argument.

This finding of fact of the District Court is wholly extraneous as to any of the issues involved in this case. We are not concerned in any respect with the Irvine Foundation with the one exception that said corporation under its Articles of Incorporation has the legal authority to act as trustee under the indenture of

trust the same as any other corporation in California that is authorized to act as a trustee.

19. The finding of fact of the District Court that the manifest objective of James Irvine in incorporating the Foundation and in executing the indenture of trust was to make it possible for a substantial part of his property to be devoted to the assistance of California charities, is clearly erroneous [R. 172].

Argument.

This finding of the District Court is not only unsupported by the substantial evidence but is contrary thereto. The intent of James Irvine in creating the private and noncharitable trust that is described in paragraph 2 of the indenture of trust is clearly established in unambiguous and certain language, and from the interpretation of said indenture of trust, from the four corners thereof, there can be no doubt that James Irvine intended that the trustee, to wit, the Irvine Foundation, as trustee, under the direction contained in said paragraph 2 would be compelled to build up the corpus or principal of the trust estate by investing so much of the balance of the income, including the whole thereof in perpetuity and where it would never be available for devotion to any charitable uses or purposes. We are dealing with an income trust, and the only trust fund that is available for the private and noncharitable purpose and the charitable purpose provided in the indenture of trust is the income received from the dividends from the Irvine Company stock. The principal or corpus of the trust can never be distributed for charitable purposes or for private purposes, and inasmuch as the trust is in perpetuity the corpus or principal will never be distributed for any purpose, either private or charitable, but will be held forever, and this private income investment provision therefore renders the entire trust illegal and void.

20. The implied finding of fact of the District Court that under Sections 12580-12595, incl., California Government Code, the Attorney General of California, by court action can prevent the trustee, to wit, The James Irvine Foundation, as trustee, from departing from the objects and purposes of the indenture of trust, including the elimination of the mandatory noncharitable direction of the trustor that is contained in paragraph 2 of the indenture of trust which requires The James Irvine Foundation, as trustee:

“Out of the balance of said income, after the deductions hereinabove provided, (the payment of administration expenses and replacement of losses), the Trustee may and in the judgment of the trustor should, each year set aside such sum as the Board of Directors of the trustee shall in its sound discretion deem wise and expedient for investment, and said trustee shall invest the same in accordance with subparagraph 3 of the powers hereinafter enumerated, which said investments, when made, shall become a part of the corpus or principal of the trust property, and the income and profits therefrom shall thereafter be used, applied and devoted as in this trust provided”, is clearly erroneous as a matter of law [R. 173].

Argument.

This finding implies that the Attorney General of California can enforce a void trust and of course neither the Attorney General or anybody else has any power under the law to do so; neither can the courts of California through action by the Attorney General convert the void Irvine trust into a valid charitable trust. The Supreme Court of California has already ruled in the following cases against the statement that is contained in the finding of fact of the District Court which implies that the Attorney General of California by court action may eliminate the investment direction contained

in paragraph 2 of the indenture of trust and thereby prevent the trustee from being bound by the illegal private investment purposes contained in paragraph 2 of the trust, to wit:

See the following authorities:

In re Sutro's Estate, 155 Cal. 727; 192 Pac. 920;

In re Kline's Estate, 138 Cal. App. 514; 32 P. 2d 677;

In re Vance's Estate, 118 Cal. App. 163; 4 P. 2d 977;

In re Peabody's Estate, 21 Cal. App. 2d 690; 70 P. 2d 249.

21. The finding of fact of the District Court that the Attorney General's construction of the trust would result in the trust being preserved for the purpose of assisting California charities and that it is the view of the District Court that the Attorney General's construction is the more natural and reasonable construction, is clearly erroneous as a matter of law [R. 174].

Argument.

This finding implies that the erroneous construction as a matter of law that the Attorney General in his post trial brief placed upon the private non-charitable and illegal investment provision contained in paragraph 2 of the indenture of trust would result in the trust being preserved for the purpose of assisting California charities is unsupported by the substantial evidence and the law in California as established under the California cases above cited. The expressed view of the District Court which is the basis for said finding that it was the view of said District Court that the Attorney General's construction of said paragraph 2 as stated in his said brief, is the more natural and reasonable construction, does not constitute a legal basis to support

said finding as the Attorney General of California is neither by his erroneous construction of said paragraph 2 or by any other action vested with any power or authority whatever to put any vitality or legality into a void charitable trust or to enforce said void charitable trust.

22. The finding of fact of the District Court that the trust involved in the plaintiff's action is a valid trust for charitable uses and purposes under the California law exempting such trusts from the rule against perpetuities, is clearly erroneous [R. 174].

Argument.

This finding is unsupported by the substantial evidence and the law as established by the California Supreme Court in the cases above mentioned.

23. The implied finding of fact of the District Court that under the indenture of trust The James Irvine Foundation would and did become the owner of the majority of the shares of the stock of The Irvine Company during the lifetime of James Irvine, is clearly erroneous [R. 174].

Argument.

This finding is not supported by the substantial evidence and the provisions of the indenture of trust disclosed that it was the intention of James Irvine that the Irvine Foundation, as trustee, would not become vested with the title to the Irvine Company stock or have vested in it as trustee any powers, rights or privileges until after the death of James Irvine which did not occur until August 24, 1947.

24. The implied finding of fact of the District Court that The James Irvine Foundation as the owner of the majority of the shares of the stock of The Irvine Company, carried with it control of that company including

its dividend policies during the lifetime of James Irvine, is clearly erroneous [R. 174].

Argument.

This finding is unsupported by the substantial evidence in the case. To the contrary, the substantial evidence established that the Irvine Foundation, was trustee of an illusory trust and was not intended by James Irvine to have and did not have any rights, powers, privileges, title or interest in or to The Irvine Company stock, as trustee, until after the death of James Irvine, and the evidence is undisputed that the Irvine Foundation, as trustee, at no time during the lifetime of Mr. Irvine asserted any dominion or control whatever over the 510 shares of Irvine stock or The Irvine Company and/or the dividend policies of The Irvine Company, during the lifetime of James Irvine. Said substantial evidence further established that said Irvine Foundation, as trustee, had no beneficial ownership interest or connection whatever during the lifetime of Mr. Irvine with any of the corporate affairs or business of The Irvine Company.

The documentary evidence in the case conclusively established that during the 10 year period following the execution of said indenture of trust on February 24, 1937, and until the death of James Irvine on August 24, 1947, The Irvine Company was a complete stranger to the Irvine Foundation, as trustee, and that during all of said 10 year period James Irvine was the absolute owner of the 510 shares of Irvine Company stock and continued at all times during said 10 year period to exercise the dominion and control over The Irvine Company, as the owner of said 510 shares of Irvine stock which he had owned and held since 1894, when The Irvine Company was incorporated, and which he continued to own and hold until he died on August 24,

1947, whereupon said 510 shares of Irvine stock became an asset in the Estate of James Irvine, Deceased, and belonged subject to the administration of said estate of James Irvine, Deceased, to the heirs at law of James Irvine. The appellant again calls the attention of the Court to the voluntary declaration of James Irvine that is contained in all of the balance sheets which are attached to each of the income tax returns of The Irvine Company during the period 1936 to 1947 which states as follows:

“Ownership of company stock

“James Irvine owns 547 shares out of a total of 1,000 shares outstanding. This stock was acquired in 1894 and his return is filed in San Francisco where he resides.”

The 547 shares of stock referred to in said balance sheets included the 510 shares of Irvine stock covered by the indenture of trust [R. 164].

25. The finding of fact of the District Court that the indenture of trust is not illegal as being contrary to public policy, is clearly erroneous [R. 175].

Argument.

This finding of the District Court is contrary to the substantial evidence and the established law in California because of the inclusion in said indenture of trust of the non-charitable and private investment purposes that are contained in paragraph 2 which authorizes and compels the trustee to divert all or part of the trust income to private and non-charitable uses, objectives and purposes, to wit: Private investments which *ipso facto* thereupon become a part of the principal or corpus of the trust estate and are thereafter frozen in perpetuity from ever being available for distribution for charitable purposes.

26. The finding of fact of the District Court that the transfer of The Irvine Company stock was not testamentary in character, is clearly erroneous [R. 175, 176].

Argument.

In support of this finding, the District Court cites the case of *Nichols v. Emery*, 109 Cal. 323, 41 Pac. 1089, and states that this authority is a landmark case which has been followed by the California Appellate Courts. This case has no application whatever to the substantial evidence that is disclosed by the record in the Irvine case. The Supreme Court in *Nichols v. Emery* only ruled that the substantial evidence in that case disclosed that the grantor-trustor intended to pass title to the grantee-trustee *in praesenti*. The finding made by the District Court merely states that the delivery of the stock was *in praesenti* but the intention of Mr. Irvine in connection therewith is not mentioned. The issue involved in the case of *Nichols v. Emery* was whether or not the grantor-trustor intended that title passed *in praesenti*. The finding of the trial court was that the grantor-trustor did not intend to pass title *in praesenti*. However, the Supreme Court held that the substantial evidence in the case disclosed that it was the intention of the grantor-trustor to pass title *in praesenti*. The Supreme Court in *Nichols v. Emery* also made a further finding, to wit, that the trust in that case was operative and absolute during the lifetime of grantor-trustor. The difference between the substantial evidence in the appellant's case and in *Nichols v. Emery* is that the Irvine indenture of trust was not operative or absolute until after the death of James Irvine. The grant deed in *Nichols v. Emery* provided that the grantee-trustee received the rents, issues and profits from the real property that was the corpus of the trust during the lifetime of the grantor-

trustor. This provision in said deed vested title in the trustee to the income, rents, issues and profits from the trust corpus and therefore an interest was transferred *in praesenti* in the trust property to the trustee during the lifetime of the trustor. There was also evidence in *Nichols v. Emery* that the grantee-trustee owned part of the crops as well as part of the profits from the corpus during the lifetime of the grantor-trustor. The record in *Nichols v. Emery* further disclosed that the attorney for the grantor-trustor made an affidavit in connection with a motion for a new trial that his client, the grantor-trustor at the time of the execution of said grant deed clearly understood that the deed vested and was intended to vest the whole title immediately to the land therein described in the grantee and trustee, and that there was no understanding between the grantor-trustor and the grantee-trustee that the grantor-trustor should remain in possession of the land described in the deed during his lifetime or at anytime at all or that he should enjoy the rents, profits, or products of said land. Furthermore, the deed in *Nichols v. Emery* was recorded immediately by the grantee-trustee whereas the Irvine Company stock certificates were never transferred on the books of The Irvine Company or by the issuance of new certificates into the name of the Irvine Foundation until approximately three months after the death of James Irvine, and while this fact is not controlling nevertheless it is a circumstance to be considered in connection with the absence of any acts on the part of the Irvine Foundation, as trustee, concerning its alleged ownership of the Irvine stock during the lifetime of James Irvine.

27. The finding of fact of the District Court that the consent of the California Inheritance Tax Department was given to the transfer to the Foundation of the 510 shares of Irvine Company stock on the stock

records of The Irvine Company, is clearly erroneous [R. 179].

Argument.

There is no evidence of any kind in the case to support this finding. The consent of the Controller of California did not mention The James Irvine Foundation [Ex. B-7, Tr. 2081]. Neither did said consent nor the consent of the Tax Commissioner of the State of West Virginia authorize the executors of the Estate of James Irvine to transfer any of the assets of said estate to a stranger to said estate which was the legal status of the Irvine Foundation, without consideration and in the absence of an order or judgment of the Superior Court of the State of California for the City and County of San Francisco in an adversary action by the Irvine Foundation against the Estate of James Irvine, Deceased.

28. The finding of fact of the District Court that James Irvine reserved no power to designate the successors in office to the members of the first Board of Directors or to remove any Director from office, is clearly erroneous [R. 181].

Argument.

The only vacancy on the board of directors or of the membership during the lifetime of James Irvine subsequent to 1937, was caused by the death of Mr. Irvine's attorney W. H. Spaulding, and was filled by Robert H. Gerdes, Mr. Irvine's attorney, who was personally selected by James Irvine to fill said vacancy [Tr. 1810].

29. The finding of fact of the District Court that Mr. O'Connor testified at the trial that he was of the view that the agency theory suggested by him in a letter dated August 6, 1949, was not well founded, is clearly erroneous [R. 180].

Argument.

This finding is contrary to the testimony of Mr. O'Connor which is set forth in the appendix to appellant's brief.

30. The finding of fact of the District Court that R. C. O'Connor in a letter signed by him, dated August 6, 1949, made a statement that the trustor (James Irvine) had "complete dominion over the trustee" lacked evidentiary support, is clearly erroneous [R. 180].

Argument.

This finding is not supported by the substantial evidence in the case which to the contrary overwhelmingly established that James Irvine had the absolute control and dominion of The James Irvine Foundation during his entire lifetime, the same as he had over his other *alter ego* The Irvine Company. Insofar as the Irvine Foundation is concerned, Mr. Irvine placed his agents, attorneys, employees and tax advisers as members and directors of said corporation, and placed his son Myford Irvine as his "dummy" president, and placed his confidential secretary E. M. Price as his "dummy" secretary-treasurer of said corporation. Both of said "dummy" officers were at all times subject to the orders and directions of their principal and employer James Irvine.

31. The finding of fact of the District Court that it seems clear that James Irvine did not have dominion over the control of The James Irvine Foundation, as trustee, under the indenture of trust is clearly erroneous [R. 181].

Argument.

This finding to the effect that James Irvine did not have the dominion and control over the Irvine Foundation is not supported by the substantial evidence.

During the 10-year period following the execution of the indenture of trust on February 24, 1937 and

until August 24, 1947, when James Irvine died, the directors and members of the Irvine Foundation, as trustee, performed no duties whatever and had no powers in connection with the post mortem operative provisions of the indenture of trust. The very minor and illusory chores carried on by them for the Irvine Foundation corporation as the attorneys, agents and employees of James Irvine were confined to passing resolutions that accepted with thanks outright cash donations from Mr. Irvine. James Irvine merely transferred his money to his other pocket. Insofar as Myford Irvine as president, and E. M. Price as secretary-treasurer of said corporation during said 10-year period are concerned, each of said individuals owed their complete allegiance to James Irvine and their employer and whatever orders and/or directions he gave to them as his "dummy" officers of the Irvine Foundation corporation would have been carried out implicitly by each of them.

32. The finding of fact of the District Court that James Irvine at any time could have alienated all of the assets of The Irvine Company would not be of determinative legal significance as to his control over the corpus of the trust and the Foundation, as trustee during his lifetime, is clearly erroneous [R. 181, 182].

Argument.

This finding is not supported by the substantial evidence. James Irvine could have alienated all of the assets of The Irvine Company at any time after the incorporation thereof in 1894 because he, solely, as the owner or in absolute control through trust agreements and proxies of all of the stock of said Irvine Company during his lifetime could have disposed of the entire assets of The Irvine Company without consulting with anybody. For all practical purposes Mr. Irvine was the only stockholder in The Irvine Company during his entire lifetime and as said sole stockholder he could have sold

all of the assets of The Irvine Company on his own signature. The acts and declarations of James Irvine as well as the provisions of the indenture of trust clearly established that Mr. Irvine never intended that title to the Irvine Company stock would pass to The James Irvine Foundation, as trustee, until after his death.

33. The finding of fact of the District Court that the control retained by the trustor, as described in the case of *Dessar v. Bank of America N.T.S.A.*, 353 F. 2d 468, was as great, if not greater than the control retained by James Irvine, as trustor, is clearly erroneous [R. 182].

Argument.

This finding is not supported by the substantial evidence or by the case quoted by the District Court. In the first place, in the *Dessar* case the indenture of trust provided in the first paragraph thereof as follows:

“The Trustor has assigned, transferred and delivered, and by these presents does assign, transfer and deliver to the Trustee the personal property described in Schedule ‘A’ attached hereto and made a part hereof, and which is declared by the Trustor to be her separate property and estate. The Trustee hereby acknowledges receipt of said property which, with any additions that may hereafter be made thereto, is intended to constitute and is hereinafter referred to as the ‘trust estate’.”

The Irvine indenture of trust contains no provision to the effect that the Irvine Company stock had been delivered to the trustee nor does the Irvine Foundation, as trustee, acknowledge in said indenture of trust over its signature that it has received the Irvine Company stock. Furthermore, in the *Dessar* case the evidence disclosed that the securities that constituted the trust estate

were actually transferred into the name of the trustee bank and that said trustee bank received the dividends on said securities and that said dividend income was paid by the bank to the trustor. It therefore conclusively appeared in the trust instrument that was involved in the *Dessar* case and from the evidence in said case that the trust involved therein was both operative and absolute during the lifetime of the trustor. In the said *Dessar* trust instrument, which is set forth in the decision of the Court, the said trustee was vested with the full powers and duties of an active trustee that was managing a trust that was both operative and absolute immediately upon the execution of the indenture of trust. The trust instrument in the *Dessar* case provided that the trustor reserved the right during her lifetime to make further amendments to the indenture of trust and to revoke the same and the right to give directions to the trustee with reference to certain investments but the trust instrument provided in this respect that if said right was not exercised by the trustor upon notice to the trustee the same was not effective. As stated by the court in the *Dessar* case it was obvious from the operative and absolute *inter vivos* provisions of the trust instrument as taken from the four corners thereof that the same was a valid trust. There is no comparison whatever between the trust instrument and the evidence in the *Dessar* case and the indenture of trust and the evidence with which we are concerned in the plaintiff's case against The James Irvine Foundation, as trustee.

James Irvine had been a party to several trust instruments prior to the 1937 indenture of trust and he knew the difference between an absolute and operative trust and an illusory trust. In 1931 Mr. Irvine entered into an indenture of trust with the Anglo-California Trust Company, of San Francisco [Ex. B-15 (Ex. B1 attached thereto), Tr. 2084], which trust indenture

provided that upon his marriage to Katharine Brown White she would be the beneficiary of said trust. Mr. Spaulding was also Mr. Irvine's attorney in 1931 and in his 1931 indenture of trust the first paragraph is quite similar to the conveyance paragraph that is contained in the Dessar trust instrument, and reads as follows:

"Now, therefore, the said trustor has conveyed, assigned and transferred and delivered, and does hereby convey, assign, transfer and deliver to said trustee in trust nevertheless as herein set forth the following property (stocks and bonds described).

"It is agreed that the said trustee has taken and received said property, and does hereby take and receive the same, to hold for the following uses and purposes and not otherwise."

When the conveyance paragraph in the *Dessar* case and the conveyance paragraph in Mr. Irvine's 1931 trust for his wife are compared with the first conveyance paragraph in the 1937 indenture of trust the substantial difference between these conveyance clauses discloses the intention of Mr. Irvine in the 1937 indenture of trust to create a testamentary trust. The said conveyance clause in the 1937 indenture of trust reads as follows:

"The trustor hereby transfers, and assigns and conveys to the trustee, to have and to hold in trust, nevertheless, and for the following trust uses and purposes, the following securities, to wit:"

Absent from the 1937 indenture of trust is the provisions in the *Dessar* trust instrument that

"the trustee hereby acknowledges receipt of said property which, with any additions that may hereafter be made thereto, is intended to constitute and is hereinafter referred to as the trust estate".

In the 1931 Irvine indenture of trust, as well as in the *Dessar* trust instrument the word "delivery" is set forth, and in each of said trust instruments the trustee acknowledges the receipt of the bonds and stocks that are described as the corpus of each respective trust estate. This is the usual provision that is contained in a true *inter vivos* trust instrument. In the 1931 trust James Irvine specifically assigned Certificate No. 33 for 40 shares of the stock of The Irvine Company to "for transfer to Katharine Brown Irvine" and by endorsement on said certificate the trustee acknowledged that said certificate had been delivered to the trustee. There is no such proof by any documentary evidence of actual delivery of the Irvine Company stock to the Irvine Foundation, as trustee, and the absence of the provision that was in the Irvine 1931 trust instrument clearly denotes the intention of Mr. Irvine not to pass title *in praesenti* to the Irvine Foundation, as trustee.

Nothing whatever is stated in the 1937 indenture of trust with reference to the management and control of the trust property during the lifetime of Mr. Irvine by himself, as trustor, or by the trustee. The reason for the absence of any management or control provision being reserved by Mr. Irvine was that he never relinquished or surrendered his dominion and control over the ownership of the Irvine Company stock and the assets represented by said stock, to wit, the land holdings and other assets of The Irvine Company, so there was no reason for James Irvine, as trustor, to reserve any powers of management in the indenture of trust with reference to the administration of the trust or his dominion and control over the 505 shares of Irvine Company stock. James Irvine never relinquished or divested himself of any control over any of the stock issued by The Irvine Company from the date The Irvine

Company was incorporated in 1894 until the date of his death in 1947. In addition to his own stock, which included the 505 shares thereof that were described in the indenture of trust, James Irvine controlled the beneficial or legal ownership title in the remaining 495 shares outstanding, which included the 200 shares of plaintiff-appellant Athalie Irvine Smith, the 50 shares he held in trust for his granddaughter Kathryn Lillard, now Kathryn Lillard Wheeler, the 40 shares that were held by the Anglo-California Trust Company for the benefit of Mr. Irvine's wife, and the 200 shares that were held by his son Myford, but which James Irvine voted by proxy at every annual stockholders' meeting of the Irvine Company from February 24, 1937 to the date of his death on August 24, 1947.

Under paragraph 3 of the indenture of trust no powers or duties whatever, nor any right, title or interest in the Irvine Company stock is given to the trustee until after the death of James Irvine. In the paragraphs preceding said paragraph 3, James Irvine reserved the dividends on the Irvine Company stock and reserved the right to vote the Irvine Company Stock and reserved the power to revoke the trust and to amend or cancel any amendments thereto. These are all of the so-called reservations or powers that are enumerated in the indenture of trust during the lifetime of James Irvine.

The powers of the trustee which commence at the top of page 4 of the indenture of trust, state:

“ . . . after the death of the trustor all rents, interest dividends and other profits of the trust property shall be collected and received by the trustee and shall be used, applied and devoted as follows: . . . ”

It is obvious that this power to receive the dividends of the Irvine Company stock was not to be operative

until after the death of the trustor, to wit, James Irvine. The powers that are contained in paragraphs 1, 2 and 3, pages 4 and 5 of the indenture of trust are expressly not operative until after the death of the trustor. The sub-paragraph under paragraph 3 makes the post mortem powers and duties of the trustee emphatically clear with the following language:

“To carry out the express purpose of this trust and in aid of its execution and the proper administration, management and application of the trust property, the Trustee is vested, *after the death of the Trustor*, with the following additional powers and discretions:

“1. To have, respecting the shares of stock hereinabove described (505 shares of Irvine Company stock) and all other securities which may be held in this trust, all the rights, powers and privileges of an owner, including the voting thereof and giving proxies therefor; . . .”

It is therefore undisputed that there were no powers of any kind or any title to the Irvine Company stock vested in the trustee until after the death of the trustor. The reference that “after the death of the Trustor” the trustee would be vested “with the following additional powers and discretions” refers back to the first paragraph on page 4, which is hereinabove set forth and which is applicable to paragraphs 1, 2 and 3, pages 4 and 5, of the indenture of trust, as to the powers stated therein and which are to *become operative only after the death of the trustor*.

This same testamentary intent of the trustor that is expressed in the indenture of trust is also expressed by James Irvine’s other acts and declarations, not only before but after the execution of the indenture of trust, and constitutes the substantial evidence in the case;

and conclusively established that not only was the trustee without any powers or duties as said trustee during the lifetime of James Irvine but, furthermore, that it was the intention of James Irvine that no title to the Irvine Company stock would pass to or vest in the trustee until after his death. This conclusion is further fortified by the provision contained in paragraph 5 on page 7 of the indenture of trust, which states that in addition to the post mortem powers and discretions of the trustee that are enumerated in the foregoing provisions of said indenture of trust the trustee and the board of directors thereof, in addition thereto were further vested with and shall have *after the death of the trustor*, and for the full duration of said trust thereafter, as to the trust property, the income therefrom, and in the execution of said trust the same powers and discretions that an absolute owner has or may have, but subject to all of the post mortem provisions and conditions of said trust. An indenture of trust was never drawn that more completely and distinctly provided that the intention of the trustor, as expressed in the Irvine indenture of trust, was solely testamentary and created a mere agency.

34. The finding of fact of the District Court that the contention of the plaintiff that the relationship of the Foundation to the shares of stock here in question was that of a mere agent is not well founded, is clearly erroneous [R. 183].

Argument.

This finding that the relationship of the Foundation to the Irvine Company stock was not that of a mere agent is not supported by the substantial evidence. We already have commented on the agency relationship between James Irvine and his son Myford and his secretary E. M. Price, and this agency subject

matter will be further considered in another chapter of appellant's brief.

35. The finding of fact of the District Court that in the indenture of trust dated February 24, 1937 the statement by the trustor therein that he "hereby transfers, assigns and conveys to the trustee" the 505 shares of Irvine Company stock, and also the five shares of Irvine Company stock, makes it clear that under the California law the indenture upon its execution and delivery transferred to the Foundation a beneficial interest *in praesenti* in the shares of stock, subject only to being divested by the exercise by James Irvine of his power of revocation, is clearly erroneous [R. 183].

Argument.

This finding which states that the statement in the first paragraph of the indenture of trust, to wit, the trustor states that he "hereby transfers, assigns and conveys to the trustee' the 505 shares of stock", is not the full assignment clause which appears in said paragraph or in paragraphs 3 and 5, and which is as follows:

"That the trustor hereby assigns and conveys to the trustee, to have and to hold in trust, nevertheless and for the following uses and purposes, the following securities, to-wit:

<u>Certificate Number</u>	<u>Number of Shares</u>
28	332
33	132
42	41"

The reference in the said first paragraph, *i.e.*, ". . . nevertheless and for the following trust uses and purposes," relates to the subsequent post mortem conveyance paragraphs in said indenture of trust hereinabove referred to, *i.e.*, the first unnumbered subparagraph under paragraph 3 on page 6, which limits and

restricts the vesting of the title to the Irving Company stock until after the death of James Irvine. This provision is not referred to at any time by the District Court in its Memorandum or in any of its findings of fact, but is completely disregarded and apparently had been overlooked. However, said sub-paragraph of paragraph 3, as well as paragraph 5 makes it emphatically clear that it was the intention of James Irvine, as trustor, that no title, rights, powers or privileges in or to the Irvine Company stock vested in The James Irvine Foundation, as trustee, until after his death, and furthermore that no powers, rights, privileges or duties vested in the Foundation, as trustee, until after the death of James Irvine. The trust described in the 1937 indenture of trust clearly was an attempted testamentary disposition and the trust was therefore illegal and void.

The further finding that it is clear that under the California law the indenture upon its execution and delivery transferred to the Foundation the beneficial interest *in praesenti* in the shares of Irvine Company stock is not supported by the substantial evidence which is, to the contrary, first, the indenture of trust itself, and second, the declarations and acts of James Irvine before and after the execution thereof, clearly show that no beneficial interest in the shares of Irvine Company stock ever vested in perpetuity or at all in the Irvine Foundation, as trustee, and that it was the expressed intention of James Irvine that the beneficial ownership of said Irvine Company stock and the title thereto was vested in himself during his entire lifetime.

The Irvine Foundation, as trustee, never at any time and in perpetuity could own or hold the beneficial interest in the Irvine Company stock for as trustee the most that it could ever hold would be the legal title

that was forever separated from any beneficial ownership interest or title.

36. The finding of fact of the District Court that James Irvine endorsed the certificates for the shares of Irvine Company stock in blank and delivered them to the Foundation, is clearly erroneous [R. 184].

Argument.

This finding implies that James Irvine endorsed the certificates of Irvine Company stock following or simultaneously with the execution of the indenture of trust and at the same time delivered said stock to the Foundation. This finding is not supported by the substantial evidence as hereinabove set forth.

37. The finding of fact of the District Court that the established California law which is applicable in this case is that the delivery of an endorsed certificate of stock is sufficient to effect a valid transfer of the shares of stock represented by the certificate, is clearly erroneous [R. 184].

Argument.

This implied finding is not a correct statement of the law in California that is applicable to the substantial evidence in this case. The basic California law that is applicable to the transfer in trust of a certificate of stock by a trustor to a trustee, is that in addition to the manual delivery to and the acceptance by the trustee, in order to constitute a valid conveyance to the trustee there must exist a mutual intention on the part of the parties, particularly on the part of the trustor, to pass title to the stock immediately. In other words, to be a valid delivery the indenture of trust must be meant by the trustor to be presently effective as an operative trust and an immediate vesting of the title, *i.e.*, there must be the intent on the part of the trustor to divest himself presently of the title. Even if the in-

indenture of trust is manually delivered but the evidence shows that the parties or the trustor intended the document to become operative only upon the death of the trustor, the document is testamentary in character and is void as a conveyance.

Declarations and acts of the trustor before and after the alleged delivery are admissible in evidence on this issue of intent. A conveyance or transfer of personal property including shares of corporate stock, delivered with the intent that it shall take effect only upon the death of the trustor is an attempted testamentary disposition and is therefore void. This finding states and/or implies that where the word "delivery" is used in the authorities cited by the District Court it means only the manual transmittal of the Irvine Company shares of stock involved; this is not true in this case because the law in California is that where the delivery that the California authorities are talking about, and the delivery with which we are concerned in this case means delivery with the intent by the trustor to vest immediately in the trustee title to the Irvine Company stock described in the indenture of trust. Furthermore, the retention of the possession of the trust property by the trustor or his agent and the exercise of acts of proprietorship over it by the trustor are evidence of ownership and a lack of delivery. Exercise of dominion over the trust *res* after the execution of the indenture of trust by the trustor James Irvine or his agents E. M. Price or Myford Irvine under the circumstances in this case, where the trustor's son and employee was the "dummy" president of the trustor's *alter ego* The James Irvine Foundation corporation, and his confidential secretary E. M. Price was the "dummy" secretary-treasurer of said *alter ego* corporation and who also was the custodian and depository of the trust *res*, to wit, the Irvine Company stock, the dominion and control by James Irvine, as the trustor

tor, is not based on surmise or conjecture. The best evidence and the substantial evidence in the case is that James Irvine controlled The Irvine Foundation corporation and the officers thereof as his employees and agents, and there was not a scintilla of evidence in the record of any real independent interest or connection whatever between The Irvine Company and The James Irvine Foundation during the entire lifetime of James Irvine. Had the 1937 indenture of trust created a valid *inter vivos* trust, and had the trustee held the legal title to the 510 shares of Irvine stock that was worth 50 million dollars at least, the trustee would have had some powers and some duties to perform in connection with the operation of a trust; as hereinabove mentioned, Myford Irvine, as president of the Irvine Foundation from 1937 to 1947 (which period represented the lifetime of James Irvine following the execution of the indenture of trust) would have attended at least one annual shareholders meeting of The Irvine Company but, as the minutes of the said Irvine Company disclose, he never went to a single meeting of the shareholders of The Irvine Company during said 10-year period, and he attended but two directors meetings during the same period. The fact that the trust was revocable did not change the right of the trustee to control the dominion over the Irvine Company stock and The Irvine Company if it was the intention of the trustor that title to the Irvine Company stock would vest immediately in the Irvine Foundation upon the execution of the indenture of trust on February 24, 1937. The minutes of the meetings of the members and directors of The James Irvine Foundation during said 10-year period [Ex. A-14, Tr. 3678], as well as its income tax returns during said 10-year period [Ex. 21, Tr. 2814] negate any contentions by the defendant Foundation that it exercised any dominion whatever as a real

independent trustee over the Irvine Company stock during the lifetime of James Irvine, and this evidentiary conclusion is made absolute by the minutes of the meetings of the shareholders and directors of The Irvine Company [Ex. 2, Tr. 3647], and the income tax returns of The Irvine Company [Ex. 3, Tr. 3647], which also during said 10-year period negate any contentions by the defendant Foundation that it exercised any dominion whatever as trustee over the Irvine Company stock during the lifetime of James Irvine. Upon consideration of the entire record and the cumulative effect of the substantial evidence, the inescapable conclusion that must be drawn therefrom is that James Irvine never intended that title to the Irvine Company stock would vest in the Irvine Foundation, as trustee, or that the trust would be operative or absolute during his lifetime. Furthermore, this finding of the District Court is not supported by the only evidence in the case concerning the time when James Irvine endorsed said certificates of Irvine Company stock, which is the testimony of David A. Black, the handwriting expert [Tr. 2573], which has already been commented upon hereinbefore and will not again be referred to.

38. The implied finding of the District Court that the established California law which is applicable in this case that the delivery of an endorsed certificate of stock is sufficient to effect a valid transfer of the shares of stock represented by the certificate, is clearly erroneous [R. 184].

Argument.

This implied finding is an incorrect statement of the law, as pointed out hereinabove in connection with finding 35 [R 183].

39. The finding of fact of the District Court that it seems clear that under the California law the endorsement by James Irvine of the certificates for the shares of stock and the delivery by him of those certificates to the Foundation transferred a beneficial interest *in praesenti* in those shares of stock to it subject only to being divested by the exercise by James Irvine of his power of revocation, is clearly erroneous [R. 185].

Argument.

This finding is not a correct statement of the law under the substantial evidence in this case, because said finding excludes the intention of Mr. Irvine not to vest the title to said Irvine Company stock immediately in said trustee or during his lifetime. Furthermore, only the legal title is vested in a trustee. The beneficial title is vested in the *cestui que trust*.

40. The finding of fact of the District Court that it is the view of said court that none of the contentions of the plaintiff are well founded, is clearly erroneous [R. 185].

41. The finding of fact of the District Court that on the merits the plaintiff is not entitled to the relief sought by her in her amended complaint, is clearly erroneous [R. 185].

Argument.

These two findings 40 and 41 are not supported by the substantial evidence.

ARGUMENT.

The Trust Set Forth in the Indenture of Trust Is Prohibited by the California Constitution, Article XX, Section 9, and Violates California Civil Code, Sections 715, 716, 749, and 771, and Therefore Fails Because of Illegality.

The provision of the California Constitution and the sections of the California Civil Code which were violated by the Indenture of Trust are as follows:

“No perpetuities shall be allowed except for eleemosynary purposes.”

Constitution, Article XX, Sec. 9.

“Except in the single case mentioned in section seven hundred seventy-two, the absolute power of alienation can not be suspended, by any limitation or condition whatever, for a longer period than as follows:

“1. During the continuance of the lives of persons in being at the creation of the limitation or condition; or

“2. For a period not to exceed twenty-five years from the time of the creation of the suspension.”

Civ. Code, Section 715.

“Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.”

Civ. Code, Section 716.

“The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust,

or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section 715."

Civ. Code, Section 771.

"The delivery of the grant, where a limitation, condition, or future interest is created by grant, and the death of the testator, where it is created by will, is to be deemed the time of the creation of the limitation, condition, or interest, within the meaning of this part of the code."

Civ. Code, Section 749.

The above provision of the Constitution which prohibits a perpetuity and the above sections of the Civil Code which declare that the absolute power of alienation may not be suspended for a longer period than either the continuance of lives of persons in being when the suspension is created or for a period not to exceed twenty-five years from the creation of such suspension are applicable to the illegal Irvine trust.

The Trust Created by the James Irvine Indenture of Trust Was Not a Charitable Trust.

The indenture of trust contains no statement of general purposes. The first clause, which names the parties, does not even identify "The James Irvine Foundation, a corporation organized and existing under the laws of the State of California, trustee," as a charitable corporation. The following paragraph to the clause that names the parties to the indenture of trust, which has been erroneously referred to as the only transfer or conveyance clause of the Irvine stock to the Irvine Foundation, as trustee, makes no reference therein to any charitable purposes for which the Irvine stock is to be held in trust, but said paragraph does state specifically that the purported transfer and assignment of the 505 shares of Irvine stock, was to be held in trust

“nevertheless and for the following trust uses and purposes”. It is significant that the foregoing quoted provision does not state, “nevertheless, and for the following ‘charitable’ trust uses and purposes”. It is therefore apparent from the beginning paragraphs of the indenture of trust that it was not the intention of James Irvine to create a wholly charitable trust, but that it was his definite intention as further expressed in paragraph 2 of the indenture of trust that a private trust with noncharitable purposes was intended by Mr. Irvine to be created under the terms and provisions of said indenture of trust, together with a trust for certain purposes that were alleged would be charitable. There is no segregation or division of the 510 shares of Irvine stock which constituted the trust *res* as between the private and noncharitable purposes and the alleged charitable purposes that are set forth in the indenture of trust. The present number of shares of the Irvine Company stock, due to stock redemptions, that constitutes the present corpus of the trust is 459 shares. There is no segregation or allocation of said 459 shares of Irvine Company stock so that a certain amount or number of the 459 shares could be set apart or designated as the individual trust property that could be identified as a separate corpus for two trust estates, one for private and noncharitable purposes and the other for charitable purposes. The expressed intent by James Irvine to create a private noncharitable trust and a charitable trust out of the same trust fund is made abundantly clear in paragraph 1, on page 6 of the indenture of trust, which describes the post mortem powers of the trustee in connection with the post mortem control and dominion of the trustee over the Irvine Company stock, and which states that the trustee “*shall hold, maintain and administer the same (the Irvine Company stock) under this trust as a unit without division or segregation thereof*”.

Paragraph 2 of the indenture of trust, pages 4 and 5, already has been alluded to as the private noncharitable investment power that compels the trustee, to each year set aside such sum out of the balance of the income after the deduction of administration expenses and losses, as the board of directors of the trustee shall in its sound discretion deem wise and expedient for investment and that said trustee shall invest the same in accordance with paragraph 3 of the post mortem powers of the trustee thereafter enumerated, and which said investments, when made, shall become a part of the corpus or principal of the trust property, in perpetuity, and the income and profits therefrom shall thereafter be used, applied, and devoted as in said indenture of trust provided, to wit, for the same private and non-charitable investment purposes that are described in paragraph 2.

Paragraph 3 authorizes the trustee to make any investments which the trustee shall decide upon, whether or not permissible by law as investment for trust funds. It is therefore apparent that the trustee may take all or part of the balance of the income received from dividends on the Irvine stock and, as provided in paragraph 2, and use the same to purchase and operate any private business enterprise for profit with no restriction of any kind.

Paragraph 4, page 7 of the indenture of trust, states:

“All discretions in this trust conferred upon the Trustee shall, unless specifically limited, be absolute and uncontrolled, and their exercise by the Board of Directors of the Trustee conclusive on all persons interested in this trust.”

The first paragraph in the Irvine indenture of trust that makes any reference whatever to the intention of James Irvine, as trustor, to create a partial charitable trust, is paragraph 3 on page 5, and is subordinated

to the private investment trust that is created in paragraph 2, and which paragraph 3 states:

“The balance of said income, after the deductions and investments hereinabove provided, shall be used, applied and devoted by the Trustee exclusively to or for the advancement of any charitable use or purpose in the State of California as now is or may hereafter be authorized in the Articles of Incorporation of the Trustee and as the Board of Directors of the Trustee shall from time to time, in its discretion, select and determine;”

It is therefore clear from the foregoing charitable subordination provisions in said paragraph 3 of the indenture of trust that the intention of James Irvine in creating said trust was private and noncharitable, and that the trust was not to be wholly for public and charitable purposes.

Prior to the execution of the indenture of trust on February 24, 1937 several letters were exchanged between Mr. Irvine's attorneys W. H. Spaulding and James G. Scarborough, and Mr. Irvine, with reference to the provisions of the proposed indenture of trust. On July 2, 1936, Mr. Scarborough wrote a letter to Mr. Spaulding and therein stated that the noncharitable investment provision to be contained in paragraph 2 of the indenture of trust was based upon the mandatory instructions of James Irvine that the trustee be compelled to invest some portion of the income for the purpose of building up the estate of the Foundation [Ex. A-20, Tr. 3680]. We therefore have a declaration of intent by James Irvine, as trustor, which he made before the indenture of trust was executed on February 24, 1937, and which removes any doubt whatever with reference to the intention of James Irvine that the trust created by said indenture of trust

must contain private and noncharitable purposes to which all or part of the income from the Irvine stock dividends must be devoted, to wit, for investments to be made by the trustee each year, and in perpetuity, as the trustee shall in its sound discretion deem wise and expedient. Attorney Spaulding, in his letter dated July 27, 1936, to Attorney Scarborough [Ex. A-21, Tr. 3681], confirms his understanding of Mr. Irvine's intention with reference to the noncharitable investment provision set forth in paragraph 2 with the statement in said letter as follows:

“Your suggested change in paragraph II on page 4 as set forth in your letter to Mr. Irvine of July 20, 1936, is to be adopted, subject to the suggestion that it read ‘the Trustee may, and in the judgment of the Trustor should, each year, set aside’ etc. What do you think of this. It avoids a mandate of doubtful legality.”

But it did not. The provision with reference to making private noncharitable investments from the balance of the total income that is set forth in paragraph 2, pages 4 and 5 of the indenture of trust is therefore tied directly into the intention of Mr. Irvine that the trust created by him was for private and noncharitable purposes, and that the power and the discretion that was vested in the trustee to devote so much of the balance of the income for investment purposes as said trustee shall, in its sound discretion deems wise and expedient, certainly is not for a wholly charitable purpose.

The division of the balance of said income that may and under the mandatory direction of Mr. Irvine, as trustor, must be used for private investment purposes is not set forth in percentages of the whole or of a designated part of said income, and therefore, it is impossible to determine how or on what division basis the

trustee will exercise its sound discretion, and leaves to the trustee the unrestricted power and right to devote all of the balance of said income to private investment purposes and this private diversion of the balance of said income or any part thereof creates a private trust which violates the statute of perpetuities and therefore renders the entire trust illegal and void.

The trust must be interpreted as of the date of its inception, to wit, February 24, 1937, and as of this date the question of how long a period the trust is to exist and whether the trust is wholly charitable, or not wholly charitable, and, therefore, void and illegal. *Estate of Gump*, 16 Cal. 2d 525; 102 P. 2d 17; *Civil Code of California*, Sec. 749.

Unless the Trust Imposes a Mandatory Duty on the Trustee to Devote the Trust Fund to a Charitable Purpose and None Other the Trust Is Illegal, Void and Fails if Its Final Termination Is Beyond the Time Limited by the Rule Against Perpetuities.

The trust created by the Irvine indenture of trust contains private and noncharitable purposes, uses and objects, and also charitable and public purposes and uses, and under the law in California that has been established in the authorities hereinafter referred to the indenture of trust involved in this case does not contain a mandatory duty on The James Irvine Foundation, as trustee, to devote the whole trust fund, to wit, the dividend income received from the Irvine Company stock, entirely to a charitable purpose, and none other, and therefore said trust is illegal and void for the reason that it violates the law against perpetuities as established by Article XX, Sec. 9, of the *California Constitution*, and also violates the law established with reference to restraints on alienation. Statements of

the law that are enunciated in said California cases which are applicable to the void trust created by the Irvine indenture of trust, have been uniformly followed in other states as well as in England where similar trust instruments have been considered and passed upon by their courts. Appropriate extracts from all of said cases will be set forth in the Appendix to the brief of appellant. These cases are as follows:

In re Sutro's Estate, 155 Cal. 72; 102 Pac. 920;

In re Kline's Estate, 118 Cal. App. 514; 32 P. 2d 677;

In re Peabody's Estate, 21 Cal. App. 2d 690; 70 P. 2d 249;

In re Vance's Estate, 118 Cal. App. 163; 4 P. 2d 977;

In re Grigson v. Harding, 144 A.R. 2d 870;

Goetz v. Old Nat. Bk. of Martinsburg, W. Va., 84 S.E. 2d 759;

Scott on Trusts, Sec. 398.2(4).

The Trust Violates the Rule Against Perpetuities.

In this appeal we are concerned both with the rule against perpetuities and the rule against restraints upon alienation.

The Irvine indenture of trust provides that the trustee takes no beneficial interest in the corpus of the trust [Ex. A-1, Tr. 3674]. The real owner of property is one who has a beneficial interest therein, not the one who holds it as trustee for others. If a trust so provides that, one's legal or equitable interest in property may, *by any possibility*, become vested after designated lives in being and 21 years plus the period of gestation, then the trust provides for a perpetuity, within the

meaning of the California Constitution and as defined by common law and as interpreted by the California court decisions hereinbefore referred to. Thus, the rule against perpetuities states the time within which property must vest, and provides that if, *by any possibility*, the time for vesting set forth in the indenture of trust may be beyond the period of time limited by the rule, a perpetuity is created.

Because the corpus of the Irvine trust was to be tied up for a longer period of time than the California Constitution allowed, it was a grant in perpetuity. The trust principal was tied up because it could never be disposed of, but was to be held forever and the beneficial interest in that principal was never to vest in anyone. Thus the Irvine trust creates, clearly, a perpetuity.

The *California Civil Code* sections 715, 716, 771 and 749 limit the period of time in which alienation may be restrained to "lives in being, or 25 years" and this limitation applies even though property is vested. The rule means that the trust must terminate within some designated lives in being when the trust was created, or in 25 years. The power to dispose of trust property in exchange for the property then received which is to be held under the same trust does not satisfy the requirement of the above described sections of the California Civil Code. If a trustee cannot convey the absolute fee—so that there will no longer be a separation of beneficial interest and legal title at all—within the period of the lives of designated persons in being plus 21 years after the creation of the trust, the trust is not only a perpetuity but also a restraint upon alienation within the meaning of sections 715, 716, 771 and 749, of the *California Civil Code*.

A violation of either the rule which prohibits the holding of trust property in perpetuity or the rule against the restraints on alienation is vital to a trust,

unless the holding of the trust property is for eleemosynary purposes solely, entirely and unequivocally.

The Irvine trust provided for a holding of trust property for a period longer than lives in being or 25 years. As long as the trust was to exist, in fact forever, the trustee was to hold the legal title separated from any beneficial interest in the property which constituted the trust *res*. The Irvine trust is not a wholly charitable trust and both rules therefore are violated and the trust is illegal and void.

In the case of *Estate of Cavarly*, 119 Cal. 406, 409, 51 Pac. 629, the Supreme Court defined the rules as to perpetuities and as to restraints upon alienation as follows:

“The two rules are, of course, quite different. One requires that within a fixed period there be persons in being capable of conveying an absolute interest in possession. That is the rule against restraints on alienation. The other requires that within a fixed period the absolute interest must vest. That is the rule against perpetuities, or, more, accurately, the rule against remoteness of vesting.

“The common law judges were much concerned with preventing the tying up of estates for long periods of time. Text writers are agreed that, when property was tied up in such fashion, it was known as a ‘perpetuity.’ Two methods were devised at common law to prevent this tying up process. The first and original method was to require that estates be alienable within a fixed period which ultimately became fixed at lives in being plus 21 years. The second was devised as early as 1685 in the *Duke of Norfolk’s Case*, 3 Ch. Cases 1 (1685). It requires the vesting of estates within lives in being. Gray, Rule Against Per-

petuities (4th ed.), sec. 2.1, p. 4; Rest., Property (div. IV), p. 2123 *et seq.*) By the middle of the Eighteenth Century the vesting period had become fixed at lives in being, plus 21 years, plus the period of gestation. (Gray, Rule Against Perpetuities (4th ed.), sec. 169 *et seq.*, p. 161 *et seq.*)”

The court reviews the history of the rule against perpetuities and the rule against restraints on alienation.

The court quoted from *Estate of McCray*, 204 Cal. 399, as follows:

“The rule against restraints on alienation has been, in some cases, confused with the rule against perpetuities; but the two rules, while having the same end in view, viz., that of preventing undue interference with the freedom of transfer of property, are of entirely different origin and application. The rule against perpetuities, engrafted upon our system by the Constitution, relates only to future interests in property, the vesting of which is to be postponed beyond the allotted time. The rule relating to restraints on alienation, on the other hand, is statutory in origin, and has reference to an undue prevention of the transfer of estates already vested. . . .”

The court concluded:

“We conclude this phase of the discussion with the holding that in this state we have both the rule against restraints on alienation, with its statutory period of lives in being or 25 years, and the rule against remoteness of vesting, with its common law period of lives in being and 21 years. While such a holding makes the work of the draftsman of wills a difficult one, such argument should be addressed to the Legislature and not to the courts.”

As to whether the provisions in question violated the rule against perpetuities, the court stated:

“Moreover, it is not the ‘probability’ of a violation of the rules against remoteness or restraints on alienation that brings such rules into operation, but only the bare ‘possibility,’ as such ‘possibility’ exists at the date of the inception of the trust.”

A Trust in Perpetuity in Which the Alleged Charitable Purpose Is Not Clearly Charitable Is Illegal and Fails.

In *Estate of Peabody*, 21 Cal. App. 2d 690, the testatrix disposed of the residue of her estate as follows:

“(7) The balance of the estate to be liquidated then to go to an institution for old people in memory of my beloved Mother and Father, Mr. J. Haskell is to make the choice of the institution.”

The court said at page 691:

“Appellants maintain the (1) paragraph seven is valid because it can be construed to create a lawful private trust, and, (2) that it is valid because it can be construed to create a charitable trust. Each of these arguments refutes the other, because, generally, if the provisions of a will which attempt to create a trust are so uncertain that they may be construed to create either a private or a charitable trust it has been usually held that the purported trust failed because of uncertainty in the instrument which attempted to create it. In *Estate of Hinckley*, 48 Cal. 457, at 509, it is said:

“‘Where a bequest is made for charitable purposes and also for purposes of an indefinite character, which are not charitable, the whole bequest will be void. If, for instance, a bequest is made for such charitable, or other purposes, as the trus-

tee should think fit, the whole bequest, will be void for uncertainty.' (Tudor on Charitable Trusts, 223.) It was said by counsel (arguendo) 'the principle of all cases is, that the portion of the trust that might otherwise be construed as charitable, can not be sustained, because the trustees have an election to apply the fund to purposes not technically charitable.'

"That the will fails to create a valid private trust is apparent from a reading of the trust provision. It violates the rule against perpetuities. (Sec. 715, 772, *Civ. Code.*) (*Estate of Hinckley, supra.*) The beneficiary under the trust, or the class from which it may be selected by the trustee, is not made certain in the instrument attempting to create it."

The court cited the *Estate of Ralston*, 1 Cal. 2d 724, and continued:

"Under paragraph seven of the will it would seem clear that the trustee could nominate as the beneficiary under the trust, or the class from which people' that was either charitable in its purposes or was organized for profit. The will contains no limitation on the power of selection by the trustee that would require him to select a charitable institution as beneficiary."

The court then quoted from *In re Shattuck's Will*, 193 N. Y. 446, and then said at page 693:

"It is well known that there are many charitable institutions that are organized and exist solely for the purpose of caring for needy old people. It is equally well known that there are other such institutions organized and conducted for private profit. Both classes may be composed of deserving institutions in that they provide repose and care

for the aged. The deceased used no appropriate language in her will to designate either of these classes. We cannot rewrite her will. We must construe it as she wrote it. The conclusion that the testatrix had in mind either a charitable institution or one organized for private profit would be based on conjecture and not on anything written in the will. In order to avoid intestacy, either partial or complete, we are not permitted to place on the will any construction not expressed in it and which is based on supposition as to the intention of the testatrix in the disposition of her estate. (*Estate of Hoytema*, 180 Cal. 430)."

The court agreed that the trust was void and that the sole surviving heir inherited the entire estate.

Indefiniteness of purpose prevents the Irvine trust from being a valid charitable trust. No charitable purpose is stated as to the use of the entire income which constitutes the trust *res*. No general purpose is stated at all. The trustee is given unlimited discretion, to use all or part of the balance of the income for noncharitable purposes.

When a gift to charity fails the law gives the property to the testator's heirs.

See *Estate of Mathies*, 64 Cal. App. 2d 767; 149 P. 2d 485.

The trust expressed in the Irvine indenture of trust was clearly at the time it was created and in perpetuity a trust the purposes of which are not definitely such as to compel the trustee to devote the entire trust income wholly to charity. The trust therefore is not a charitable trust.

The Trust Violates the Rule Against Restraints on Alienation.

The *California Civil Code*, Sec. 679, provides:

“The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws.”

The fact the trustees had a power of sale does not save the trust from a violation of the rule.

“The mere power of sale does not, under such circumstances, save the provisions of the trust, since the proceeds of the sale are still to be held in violation of the law. (Civ. Code secs. 715, 771; *Estate of Hinckley*, 58 Cal. 457, 481; *Hawley v. James*, *supra*; *Haynes v. Sherman*, *supra*.) Nor is it the law of this state that the provisions against restraints upon alienation do not apply to trusts of personal property. . . .”

In re Walkerly, 108 Cal. 627 at 656.

As said *In re Steele Estate*, 124 Cal. 533, and repeated in the *Estate of Troy*, 214 Cal. 53, and applicable to both the rule against restraints on alienation and the rule against perpetuities:

“The Statute does not permit us to wait and see whether events may not so transpire that in fact no perpetuity results; but if, under the terms of the deed or will creating the trust, when properly construed, the instrument ‘by any possibility, may suspend’ the absolute power of alienation beyond the continuance of lives in being, the instrument, whether a deed or will, is void, and no trust is created nor any estate.”

The rule against restraints on alienation applies to personal property as well as to real property.

“Again, Section 771 of the Civil Code shows plainly the applicability of the law to personal property. For if it be only the suspension of the power to alienate real property which is under the ban, power to sell the realty would relieve the difficulty, and yet it is by that section expressly declared that personal property held after sale under the terms of the original trust operates to suspend the power of alienation, under Section 715 of the Civil Code. And finally, the applicability of Section 715 to trusts in personal property has often been recognized, and never questioned. (*Estate of Hinckley, supra*; *Goldtree v. Thompson*, 79 Cal. 613; *Williams v. Williams*, 73 Cal. 99; *Whitney v. Dodge*, 105 Cal. 192.)”

In re Walkerly, 108 Cal. 627 at 656.

In *Shean v. Michel*, 6 Cal. 2d 324, at 327, the court said:

“If the trust thus attempted to be created is by its terms designed to be continued during the minorities of children born after the delivery of the trust instrument, it is obvious that the instrument creates a suspension of the power of alienation in violation of the provisions of section 715 of the Civil Code. That section provides that, except in the single case mentioned in section seven hundred seventy-two, which exception is not material herein, ‘the absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than as follows: 1. During the continuance of the lives of persons in being at the creation, of the limitation or condition; or 2. For a period not to exceed twenty-five years from the time of the creation of the suspension.’ The possibility of the suspension of the

power of alienation created by the contingency that all of the persons in being at the time of the creation of the trust may die before the youngest unborn child becomes twenty-one years of age, or the possibility of the suspension beyond the twenty-five year period, renders the trust void at its creation and title does not vest in the trustee. (Secs. 716, 749, 771, Civ. Code; *Estate of Troy*, 214 Cal. 53, 56 (3 Pac. (2d) 930).) Section 716 declares that 'every future interest is void in its creation which, *by any possibility*' may suspend the power of alienation longer than the Code permits. This possibility is to be determined by the conditions existing 'at the time of the creation of the limitation of future interest. . . .'—in this case at the time of the execution and delivery of the trust instruments. (Secs. 749, 771, Civ. Code.) '“The statute does not permit us to wait and see whether events may not so transpire that in fact no perpetuity (suspension) results, but if under the terms of the deed or will creating the trust, when properly construed, the instrument ‘by any possibility may suspend’ the absolute power of alienation beyond the continuance of lives in being, the instrument, whether a deed or will, is void, and no trust is created nor any estate vested in the trustees.” (*Estate of Steele*, 124 Cal. 533, 537 (57 Pac. 564); . . .’ (*Estate of Whitney*, 176 Cal. 12, 15, 16 (167 Pac. 399); *Estate of Maltman*, 195 Cal. 643, 649 (234 Pac. 898); *Estate of Tory*, *supra*, p. 57.)”

The Irvine trust was an express written indenture of trust which provided that the principal should be held and the beneficial interest not vest, not only beyond the period of time allowed by law, but forever, and therefore a perpetuity; and as it was a perpetuity and provided for purposes not wholly charitable it was pro-

hibited by the *California Constitution*, Article XX, Sec. 9; and it was also in violation of, and declared illegal and void as in restraint upon alienation, by the *California Civil Code* Sections 715, 716, 749 and 771.

The purposes of the attempted Irvine trust were illegal and void and in violation of the aforesaid provisions of the California Constitution and the sections of the California Civil Code because:

(a) The purposes provided for possible vesting beyond the period of time allowed by law—a perpetuity.

(b) The purposes provided a holding beyond the period of time allowed by law—a restraint on alienation.

(c) Part of the purposes described in the indenture of trust left it wholly in the discretion of the Irvine Foundation, as trustee, to select the objects and purposes and the amounts to be distributed to each; and made it possible without violating the trust provisions to distribute the trust income to noncharitable and private purposes in perpetuity.

(d) Charitable and noncharitable designated purposes were provided for as well as other purposes not restricted to charity, and all to be paid out of the income from the same principal which was to be held in perpetuity. No means were provided for or were legally possible for a division between the charitable and noncharitable purposes therefore the whole, as declared by the California cases cited above, is noncharitable and such a trust in perpetuity and/or in restraint of alienation is illegal and void and fails on that account.

The Irvine Indenture of Trust Must Be Interpreted Within Its Four Corners.

In *Estate of Young*, 123 Cal. 337, 55 Pac. 1011, the court said:

“It is true that courts have always leaned to construction which will avoid intestacy, and their swift

willingness in this regard has passed into a rule of construction, but there are well-defined limits beyond which the courts have not gone, and beyond which they could not go without subverting all rules and leaving the interpretation of every will to the mere caprice and whim of the chancellor. One of these rules, firmly established, and never departed from nor even criticized, is that *the expressed intent will not be varied under the guise of correction* because the testator misapprehended its legal effect. The testator is presumed to know the law. If the legal effect of his expressed intent is intestacy, it will be presumed that he designed that result. The injury will not go to the secret workings of the mind of the testator. It is not, what did he mean? but, it is, what does his words mean? In *Bingel v. Volz*, 142 Ill. 214, 34 Am. St. Rep. 64, it is well said: 'The purpose of construction as applied to wills is unquestionably to arrive if possible at the intention of the testator, but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in the language of the will.' (Citing cases.)

"The case thus presented is one where the expressed intent of the testatrix is plain, but where a full performance of the acts which she has directed will amount in law to nothing. The testatrix, it may be assumed, did not understand the legal effect which would follow a compliance with her will, or thought that the legal effect would be other than it is. But a court for this reason is not justified in speculating over what it may believe to have been her intent in place of the directions which she has actually employed. The inquiry of the court in construing a will comes to an end when the in-

tent has been discovered from the language of the will. Its duty is then limited to giving effect to that intent so far as may be, without doing violence to express law or the mandates of public policy. *It is never at liberty to supply omissions or to wrest language from its plain import, and give it such a meaning as it may be guessed the testatrix would have intended if she had known that her own efforts to create a legal devise had resulted in failure.* (In re Walkerly, 108 Cal. 659; 49 Am. St. Rep. 97.) Here, to repeat, there is no doubt as to the language and its meaning. The testatrix merely mistook the legal effect which would follow a compliance with her directions. While no form of expression is required to create a devise, and while considering that wills are frequently made by ignorant people in a great extremity of sickness, and under an impending fear of immediate death, and while therefore, much liberality is and should be shown in construing the term of such instruments, in every case some words must be employed from which under the rules of law an expressed intent to devise particular real estate must be found in the will itself; otherwise the court is not carrying out the last will of the deceased, but is making testamentary disposition of his property for him; not such disposition as the testator made, but such disposition as the court thinks he would have made. This can never be permitted." (Italics ours).

In *Estate of Sessions*, 171 Cal. 346, 153 Pac. 231, the court said at page 349:

"The paramount object in resolving an ambiguity in a will is to ascertain the intention of the testator. All other of the established rules of

construction are designed to assist in this main object. *But the intention sought for is not that which may have existed in the mind of the testator, but that which is expressed in the language of the will*, giving such language, if clear, its ordinary meaning, and if ambiguous, the meaning it should have, in the light of the contest and the circumstances shown to explain the meaning. (Estate of Young, 123 Cal. 344, (55 Pac. 1011); Estate of Tompkins, 132 Cal. 176, (64 Pac. 268).)" (Italics ours).

In *Estate of Hoytema*, 180 Cal. 430, 213 Pac. 53, as to the rule that a will should be liberally construed to carry out the intent of the testator, the court said:

"This intent, however, must be found in the language used in the will taking into view in cases of uncertainty arising upon its face the circumstances under which it was made."

In *Estate of McKay*, 42 Cal. App. 316, 183 Pac. 574, a devise in a will read as follows:

"I give, devise and bequeath all my estate, real and personal, whatsoever and wheresoever, in manner following: To my wife Elizabeth M. McKay, the one-fifth (1/5th) part thereof, and to each of my children Horton L. McKay and Ethel M. McKay the undivided fourth-fifths (4/5ths) part thereof."

"It is undoubtedly settled law relative to the interpretation of wills that the intent of the testator must be extracted from the express terms of his will, and that courts are not permitted to indulge in conjecture or surmise for the purpose of arriving at an intent which is not reasonably to be drawn from the language of the document itself."

In *Estate of Doane*, 190 Cal. 412, 213 Pac. 53 at 415 the court said:

“The decedent having made an invalid provision in clear, unequivocal, language, *the courts are without power to alter that language to express what may have been in the testator’s mind* but was not attempted to be expressed by him, however beneficent such unexpressed intent may have been. ‘It may be said of all wills, that the testator’s intent is to make a valid disposition of his property . . . But a court is not therefore authorized to modify or vary the plain language of the testator, and thus create a new and valid will for him, even if it were certain that the testator would have adopted the interpretation of the court, had he known his own attempt was invalid.’ (*Estate of Walkerly, supra*, 627, 659.)” (Italics ours).

“For the duty of the court is to interpret not to construct; to construe the will, not to make a new one.”

Herzog v. Title Guarantee & Trust Co., 177 N.Y. 86;

U.S. Security Trust Co. v. Petrillo, 220 N.Y. Supp. 635, 641.

“The paramount rule of construction is that if other wise legal, the intent of the parties is to prevail but such intent is the *express intent* as written and is to be derived where possible from the document itself considered as a whole.”

Petition of Tuckermow, 60 N.Y. Supp. 2d 734; citing

Farmer’s Loan & Trust Co. v. Callen, 246 N.Y. 481, 487;

Buffalo E.S.R.R. Co. v. Buffalo Ft. A.R. Co., 111 N.Y. 132, 139.

“The rules of construction are well settled. The intention of the grantor is the intent revealed in the trust instrument not his secret wishes, desires or benefits after the event. The court is limited to the four corners of the instrument.”

City Bank Farmers Trust Co. v. McFadden, 65 N.Y.S. 2d 395.

Not only does it appear from the express language contained in paragraph 2 of the Irvine indenture of trust that the trustee is required to invest all or part of the trust income each year and in perpetuity, but further that when said income is so invested that it shall become a part of the corpus or principal of the trust and thereafter be frozen in perpetuity and never be available for charitable purposes. It should also be recalled that in the letter from Attorney Scarborough to Attorney Spaulding dated July 2, 1936 [A-20, Tr. 3680], Mr. Scarborough stated that Mr. Irvine desired that the investment provisions to be contained in the indenture of trust and which were set forth in Mr. Scarborough's letter, be submitted to Mr. Spaulding, so that at the next conference between Mr. Irvine and Mr. Spaulding upon Mr. Irvine's return to San Francisco, the same could be discussed, and Mr. Scarborough made the further significant statement:

“... it is Mr. Irvine's desire that the trustee be *compelled* to invest some portion of the income for the purpose of building up the estate of the Foundation”.

On July 27, 1936, Mr. Spaulding replied to Mr. Scarborough's letter of July 2, 1936 [Ex. A-21, Tr. 3680] and stated:

“Your suggested change in paragraph II of page 4 as set forth in your letter to Mr. Irvine of July 20, 1936, is to be adopted subject to the suggestion

that the trustee may and in the judgment of the trustor should each year set aside, etc.”

It therefore appears that not only is it clear from the four corners of the indenture of trust that James Irvine intended primarily that under paragraph 2 thereof all or part of the income of the trust must be used for private and noncharitable purposes, to wit, investments, and that under paragraph 3 the balance of said income, if any was left after the investments were made, could be devoted to public and charitable uses, but that this intention is further confirmed by the two letters that were exchanged between Mr. Irvine’s attorneys Messrs. Spaulding and Scarborough, hereinabove referred to.

Upon the Failure of the Irvine Trust on the Death of James Irvine the Plaintiff Athalie Irvine Smith and His Other Legal Heirs Take the 459 Shares of Irvine Company Stock Held in Trust by the James Irvine Foundation, as Trustee.

In Pomeroy’s Equity Jurisprudence, Sec. 1032, it is observed that with reference to trusts created where the property is conveyed by will or deed and the purposes fail in whole or in part, or the trusts are so uncertain and indefinite that they lapse or are illegal, a trust results in favor of the grantor or his heirs.

Civil Code of California, Sec. 866, provides:

“Where an express trust is created in relation to real property every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust or his successors.”

The rule against restraints on alienation applies to personal property as well as real property. In *re Walkerly*, 108 Cal. 627; 41 Pac. 772. Under the provisions of Sec. 866 of the *Civil Code*, James Irvine, during his life was the beneficial owner of the 510 shares of Irvine

Company stock held under the 1937 indenture of trust, and the trust having failed because of illegality no named beneficiary took any interest thereunder.

In *In re Wittfield v. Foster*, 124 Cal. 418; 57 Pac. 219, the court said:

“Under the circumstances, where the trusts declared in an instrument are illegal, or for any reason void, either the trustee takes no estate, or there is a resulting trust to the grantor or his heirs; and in the case at bar it is immaterial which of these results follow.”

In this appeal it is not material whether James Irvine, during his lifetime, as the grantor of the Irvine Company stock purportedly conveyed in trust, was the beneficiary of a resulting trust or whether the Irvine Foundation, as trustee, took no estate; whether James Irvine held an equitable interest as a resulting trust beneficiary or also the legal interest; because his grant failed, makes no difference because his heirs took whatever his property rights were, be they legal or equitable or both. In no case can the defendant The James Irvine Foundation benefit by a failure of the trust.

When a trust is void or illegal, as in the present case, those who are named therein as beneficiaries take no interest.

In the case of *Booge v. Reinicke*, 45 Cal. App. 2d 60; 113 Pac. 481, the court said:

“Whatever may be the rule in other jurisdictions, it has been definitely held in this state that where a trust is void as a legal restraint upon alienation (*Civil Code*, Sec. 715), no title or right whatever is acquired either by the trustee or any of the beneficiaries.”

Under the authorities hereinabove cited the established law in California is that a trust in perpetuity which

is partly for charitable purposes and partly for non-charitable purposes, is illegal and void and fails.

It is also the established law in California that the heirs of the trustor succeeded to the trust property after the failure of such a trust.

In *Estate of Walkerly*, 108 Cal. 627, 41 Pac. 772, it was said:

“The determination that the trusts are void renders unnecessary any consideration of the other points presented. The trusts being void, it follows as to the property attempted to be devised in trust, that the testator died intestate. It therefore descends to the heirs living at the time of his death. For the foregoing reason the decree is reversed.”

In *Campbell-Kawannanako v. Campbell*, 152 Cal. 201, 92 Pac. 184 it was said:

“The trust here, therefore, was void as to the real property of deceased situated within the State of California. It follows that as to such property the deceased died intestate, and the same descended by succession to his heirs at law . . .”

To the same effect:

In re Whitney's Estate, 176 Cal. 12;
In re Maltman's Estate, 195 Cal. 643;
Estate of Van Wyck, 185 Cal. 49.

In *Estate of Peabody*, 21 Cal. App. 2d 690; 70 Pac. 249, it was said:

“Where a trust as to a residue was held invalid because of uncertainty as to whether it created a charitable or non-charitable trust, the decree of the probate court giving the property to the sole heirs of the decedent was affirmed.”

In another part of this brief we will point out that James Irvine died intestate as to the Irvine Company

stock that is involved in this case. Under the cases above cited it is the established law in California that during his lifetime James Irvine either conveyed no title, so that no title or right was ever acquired by the defendant The James Irvine Foundation, as trustee, or any of the beneficiaries, or that James Irvine was the beneficiary of a resulting trust. In either case the plaintiff Athalie Irvine Smith and his other heirs are now entitled to the Irvine Company stock.

The Exercise of Acts of Ownership and Dominion by the Trustor as Well as the Absence of Such Acts on the Part of the Trustee Are Evidentiary Circumstances and the Cumulative Effect of Such Evidence Is Sufficient to Establish the Non-Delivery of the Irvine Company Stock by the Trustor to the Trustee.

The substantial evidence established that commencing in 1936 N. Loyall McLaren discussed with James Irvine a plan for Mr. Irvine to dispose of the major part of his estate to wit, his shares in The Irvine Company, upon his death, which would preserve and perpetuate the Irvine Ranch in Orange County, California, as a perpetual monument to James Irvine and would protect his estate from the payment of ruinous Federal estate taxes and California inheritance taxes which eventuality would happen if the Irvine Ranch or the majority stock in the Irvine Company became an asset in Mr. Irvine's testamentary estate [Tr. 286-295].

Mr. McLaren testified that he convinced Mr. Irvine that the vehicle to be set up to accomplish this two-fold purpose was a charitable *foundation*. No other plan was considered [Tr. 256]. Following this discussion Mr. Irvine consulted his attorneys Mr. Spaulding in San Francisco and Mr. Scarborough in Los Angeles with reference to the legal steps that were necessary

to put the appropriate vehicle organization into effect. Said attorneys expressed their opinions to Mr. Irvine that there should be two organizations or entities involved to accomplish the plan or the vehicle which had been discussed, to wit, a California charitable corporation to be organized under the name of The James Irvine Foundation; the directors of said corporation and the members thereof would be the agents and employees and attorneys of Mr. Irvine and would also include Mrs. Irvine, and second, an indenture of trust to be executed by Mr. Irvine as trustor and The James Irvine Foundation corporation, as trustee. Mr. Irvine would make a colorable transfer of 505 shares of the stock of the Irvine Company to said Irvine Foundation, as trustee, and the provisions of the indenture of trust would provide that said trust would not become operative or absolute until after the death of Mr. Irvine, and no powers, rights, privileges or title to the Irvine Company stock would vest in said Irvine Foundation, as trustee, until after the death of Mr. Irvine [Tr. 295-296, Exs. A-1, Tr. 3674, A-15—A-25, Tr. 3679-3682].

During the year 1936 several drafts of the indenture of trust were prepared by attorneys Spaulding and Scarborough. During the course of preparing said drafts certain letters passed between Attorney Spaulding and Attorney Scarborough and Mr. Irvine. These letters throw considerable light on the intention that was expressed by Mr. Irvine in the provisions of the indenture of trust which was executed on February 24, 1937. It appears from the contents of said letters that the principal objective to be achieved under the indenture of trust was that Mr. Irvine would remain during his lifetime as the absolute owner of the 505 shares of the Irvine Company stock and that at all times during his lifetime he would have the dominion and control over said Irvine Company stock and The Irvine

Company and The Irvine Foundation, as trustee and, furthermore, that the title to the Irvine Company stock would not become vested in The James Irvine Foundation, as trustee, until after the death of Mr. Irvine. This intention on the part of Mr. Irvine is referred to in the letter dated May 25, 1936, from Mr. Spaulding to Mr. Irvine. This letter was introduced in evidence as Exhibit A-15 [Tr. 3679]. In this letter Mr. Spaulding states:

“Mr. McLaren, the other day, suggested that the indenture of trust give more duties to the trustee. The fact is, however, that with a *depository*, and in view of the *limited purposes* of the trust during your lifetime, the trustee will, in fact, have little to do”.

It is therefore apparent from said letter that Mr. Irvine intended that there would be no divestment of his beneficial ownership of the 505 shares of Irvine Company stock or his dominion and control not only over such stock, but also over The Irvine Company and The James Irvine Foundation, during his lifetime [Exs. A-15, A-25, Tr. 3679-3682]. The indenture of trust carries out this intention of Mr. Irvine as under the provisions contained therein, particularly paragraphs 3 and 5, it is provided that no powers, rights, privileges or title connected with the Irvine Company stock will become vested in the trustee until after the death of Mr. Irvine. Furthermore, under the provisions of the indenture of trust no powers or duties were vested in the trustee until after Mr. Irvine's death. The indenture of trust does not contain the provision that Mr. Irvine shall have the power to direct the trustee concerning the administration of the trust during his lifetime, and this reserved power was not considered because Mr. Irvine did not change his ownership status of the Irvine Company stock until after his death and there-

fore it was not necessary for the indenture of trust to provide, as such trust instruments do in cases where the trustor makes a conveyance of the title to the trust property that is *in praesenti* but reserves to the trustor the right and the power of either personally conducting the management of the trust or to direct the trustee as to how said trustee shall exercise its trustee duties and powers. It would also be incompatible with the expressed intention of Mr. Irvine that title to the Irvine Company stock was transferred immediately by Mr. Irvine where it appears in Mr. Spaulding's letter that E. M. Price who was to have the custody with Mr. Irvine of the Irvine Company stock during Mr. Irvine's lifetime would *only be a depositary*, which would exclude any intention by Mr. Irvine that the legal title was to vest in the Irvine Foundation, as trustee, during the lifetime of Mr. Irvine. The status of a trustee is not that of a depositary, but in a true trust such trustee would be the owner of the legal title to the corpus of the trust. This intention of Mr. Irvine that he would remain as the absolute beneficial owner of the Irvine Company stock with all the appurtenances and rights that an owner of property has during his lifetime is again expressed in a letter from Mr. Spaulding to Mr. Irvine dated June 12, 1936 [Ex. A-16, Tr. 3679].

In this letter Mr. Spaulding advises Mr. Irvine that certain differences have arisen between himself and Mr. Scarborough with reference to the functions of the proposed trust and the proposed Irvine Foundation corporation. Mr. Spaulding states that, in his opinion, upon the death of Mr. Irvine the property, to wit, the Irvine Company stock, should go absolutely to the Irvine Foundation to be used by that Foundation for any of the charitable purposes within the scope of the purposes set forth in its articles of incorporation, but that in the opinion of Mr. Scarborough the Irvine

stock should go to the Irvine Foundation, as trustee, after the death of Mr. Irvine and be held by the trustee under the provisions of the indenture of trust and that said Irvine Company stock upon the death of Mr. Irvine should not go directly to the Irvine Foundation corporation in accordance with the recommendations of Mr. Spaulding.

Again it is made quite clear in Mr. Spaulding's said letter to Mr. Irvine that the vesting of the legal title ownership in the Irvine stock in the trustee shall not become operative or absolute until after the death of Mr. Irvine regardless of whether the stock goes outright to the corporation or goes only to the corporation as trustee. It is therefore clear that Mr. Irvine was to continue to be the absolute beneficial owner of the Irvine Company stock during his lifetime but that the physical possession thereof would be in himself and or E. M. Price as his agent and not with the Irvine Foundation, as trustee. It is therefore apparent that James Irvine continued to have the dominion and control over the Irvine Company stock as the real beneficial owner thereof during his entire lifetime.

In a letter from Mr. Scarborough to Mr. Spaulding dated June 19, 1936 [Ex. A-17, Tr. 3680], Mr. Scarborough stated that "Mr. McLaren had suggested that from a tax standpoint the certificates of stock should not remain in the name of James Irvine but that the proposed transfer of the stock under the provisions of the indenture of trust "should be further *carried out in form* by endorsement of the certificates and their delivery to and acknowledgment by the Foundation". Mr. Scarborough then further stated that in compliance with Mr. McLaren's suggestion, that Mr. Scarborough himself suggested to Mr. Spaulding that the certificates of stock remain in Mr. Irvine's name, but

that they be endorsed by Mr. Irvine and delivered to Miss Price. Now, Miss Price since 1917 had been the confidential secretary to Mr. Irvine and therefore her primary and superior relationship to Mr. Irvine was that of an agent who was subject to Mr. Irvine's control and domination. Mr. Irvine, over the years since 1917, had placed great trust and confidence in Miss Price as his confidential agent and had given her access since December 17, 1928 until he died, to his safe deposit box in the Crocker Bank in San Francisco, and this safe deposit box contained millions of dollars of negotiable bonds and securities that belonged to Mr. Irvine [Ex. B-15, Tr. 2084], which indicates that his trust and confidence as well as the superior agency relationship between Mr. Irvine and Miss Price was very great indeed [Ex. A-65, Tr. 561]. Mr. Scarborough further suggested that the certificates of Irvine Company stock, when delivered to Miss Price would be in her ostensible capacity as the proposed secretary of the Irvine Foundation corporation. Then follows the sentence in said letter which conclusively established the relationship of Miss Price as the custodian and depositary of the 510 shares of the Irvine Company stock as that of the agent of Mr. Irvine regardless of whether or not she would also be the "dummy" secretary for Mr. Irvine of the Irvine Foundation corporation, the *alter ego* of Mr. Irvine, because she was to keep the Irvine Company stock in the safe in Mr. Irvine's office in San Francisco which would also be the paper office of the Foundation.

The Irvine Foundation corporation was incorporated on January 7, 1937, and the first meeting of its incorporators was held on February 1, 1937, and on the same date the directors who were named in the articles of incorporation held their first meeting and elected the officers of the corporation. Myford Irvine, the only

living son of James Irvine and the employee and agent of James Irvine, was elected the "dummy" president; E. M. Price, who, since 1917 had been the confidential secretary and agent of James Irvine, was elected the "dummy" secretary-treasurer. At this meeting no mention whatever was made with reference to any gift of Irvine stock by Mr. Irvine to the Foundation, as trustee, nor anything else connected with the Foundation, as trustee under the provisions of the indenture of trust. It is therefore obvious that the Irvine Foundation was to have no powers or duties, as trustee, during the lifetime of Mr. Irvine nor to have any ownership, title to, or interest in the Irvine Company stock during his lifetime. No resolution of appreciation to Mr. Irvine for the creation of the said trust or the colorable gift of said 505 shares of Irvine Company stock was adopted either at this meeting or at any other meeting of the board of directors or the members of The James Irvine Foundation that was held during the lifetime of Mr. Irvine.

Following the execution of the indenture of trust on February 24, 1937 no change whatever took place in the status of James Irvine as the owner of the 505 shares of Irvine Company stock that is described in said indenture of trust, or in his dominion and control over The Irvine Company, as well as his control of The James Irvine Foundation that was staffed with his employees, agents, attorneys and tax advisers as its directors and officers, and who in such capacities were subject to his directions and orders. The records of The Irvine Company, including the minutes of the meetings of the stockholders and directors of said corporation, the income tax returns of the said Irvine Company, and the acts and declarations of Mr. Irvine, indicated no change whatever with reference to his absolute control and dominion over the 505 shares of Irvine Company stock [Exs. 2-3; Tr. 3647].

The deposition of George L. Beaubien was introduced in evidence by the defendant Foundation. Mr. Beaubien testified that he had worked for Mr. Irvine as bookkeeper from May 20, 1917 until the date of Mr. Irvine's death on August 24, 1947 [Tr. 891-892]. Mr. Beaubien testified that he took care of Mr. Irvine's books and of the various enterprises in which Mr. Irvine had an interest—Mr. Irvine's personal books and various enterprises [Tr. 892-893]. George L. Beaubien went to work for Mr. Irvine in 1917 and at that time T. V. Maxwell was Mr. Irvine's secretary and Miss E. M. Price also worked in Mr. Irvine's office as a stenographer [Tr. 893]. Mr. Beaubien took the job of a previous bookkeeper [Tr. 894]. Myford Irvine worked in his father's office all of the time until after his father's death; that no other persons than those identified worked in said office during the lifetime of Mr. Irvine [Tr. 895]. Mr. Irvine came to his office from 1917 until he died, and he worked there periodically; he would go down to the Ranch at times and then he would go hunting and fishing. He usually spent a couple of months during each year at the Irvine Ranch in Orange County, California [Tr. 896-897]. Mr. Irvine had all of his personal books covering his personal accounts, and all records of transactions and his journals and ledgers and cash books and trial balance books in his office at 820 Crocker Building, San Francisco [Tr. 899-900]. There were some books of the Irvine Foundation that were kept in Mr. Irvine's office and he also kept copies of certain entries of The Irvine Company that were made down at the Ranch, where copies of said entries were sent up to the San Francisco office and Mr. Beaubien then kept

a record of certain accounts [Tr. 900]. Mr. Beaubien stated that he was the only one that made entries in Mr. Irvine's books; that the said entries covered Mr. Irvine's security holdings and property holdings [Tr. 900]. Mr. Beaubien stated that he knew nothing whatever about the 1937 indenture of trust and never saw a copy thereof until subsequent to 1952. All that he knew was office gossip; Mr. Irvine told him nothing [Tr. 969].

Charles N. Whitehead gave the same testimony as a witness during the trial as had Mr. Beaubien, to wit, that he never saw any entries concerning the 1937 indenture of trust in any of Mr. Irvine's books when he reviewed them each year, commencing in 1937 and until Mr. Irvine died in 1947, in connection with the preparation by Mr. Whitehead of Mr. Irvine's personal income tax returns [Tr. 2866-2867].

With reference to the statement of Mr. Beaubien that he never saw the indenture of trust until after 1952, the District Court took particular notice thereof and in its memorandum and findings said Court made the following statement, to wit:

"George L. Beaubien gave testimony by way of deposition. He was the personal bookkeeper and accountant for James Irvine until his death in 1937. He took care of the personal business papers, books and records of James Irvine. . . . He further testified, in substance, that he had not seen the indenture of trust during his period of service with James Irvine." [R. 162].

The substantial evidence further established that Mr. Irvine was meticulous about the entires that he insisted be set forth in his books of account by Mr. Beaubien,

as indicated by letters sent by Mr. Irvine to McLaren, Goode & Co., his tax advisers and accountants, dated July 11, 1936, and February 6, 1939 as follows:

“July 11, 1936

“Messrs. McLaren, Goode & Co.

444 California Street

San Francisco, California

Gentlemen:

Referring to my declaration of trust dated August 17, 1935, whereunder Kathryn Anita Lillard, et al, are beneficiaries, and of which a duplicate original is held by your office.

Under the provisions of Article 7th thereof, I wish to advise you that I have this day released said beneficiary from the obligation to pay me ten thousand dollars (\$10,000.) under the provisions of Article 1st of said declaration of trust.

As a result of this release, the lien created by said Article 1st against the income from the corpus of the trust property in the sum of one hundred thousand dollars (\$100,000.) is reduced to ninety-thousand dollars (\$90,000.).

I wish to advise you further that I have made appropriate entries in my personal books which record the gift of ten thousand dollars (\$10,000.) to Kathryn Anita Lillard.

Yours truly,

(signed) JAMES IRVINE”

On February 6, 1939 Mr. Irvine sent the following letter to Messrs. McLaren, Goode & Co., 444 California Street, San Francisco, California:

“Gentlemen:

Referring to my declaration of trust dated August 17, 1935, whereunder Kathryn Anita Lillard, et al, are beneficiaries, and of which a duplicate original is held by your office.

Under the provisions of Article 7th thereof, I wish to advise you that I have this day released said beneficiaries from the obligation to pay me seventy-thousand dollars (\$70,000.) under the provisions of Article 1st of said declaration of trust. As a result of this release the lien created by said Article 1st against the income from the corpus of the trust property in the sum of one hundred thousand dollars (\$100,000.) has been satisfied in full and there is no remaining lien against the trust property.

I wish to advise you further that I have made appropriate entries in my personal books which record the gift of seventy-thousand dollars (\$70,000.) to Kathryn Anita Lillard.

(Signed) James Irvine”

[Ex. B-15, Tr. 2084].

This exhibit B-15, the Irvine estate tax return contains copies of the above indicated letters from James Irvine and are marked “Exhibit G-2” to “Exhibit G-5”, inclusive, of said estate tax return.

The above mentioned letters that Mr. Irvine sent to his accountants and tax advisers, which was the firm of N. Loyall McLaren, clearly indicates how metic-

ulous Mr. Irvine was with reference to the entries that were contained in his books of account with reference to all of his business transactions, particularly including any indenture of trust which was executed by him as trustor, and any gifts which were made by him in connection with said indentures of trust. Said letters further disclose that a duplicate original of the indenture of trust described therein was deposited with Mr. McLaren's accounting office. It is therefore very significant that the 1937 indenture of trust between James Irvine, as trustor, and The James Irvine Foundation, as trustee, was never entered in the personal books of account of Mr. Irvine nor was any duplicate original, or even a copy thereof ever filed with Mr. McLaren's accounting office [Tr. 306-308]. This evidence leaves but one conclusion, and that is that James Irvine never intended that the 1937 indenture of trust would be operative or absolute during his lifetime and, further, that he never intended that the title to the 510 shares of Irvine Company stock would vest in The James Irvine Foundation, as trustee, until after his death.

Also attached to Exhibit B-15 [Tr. 2084] are copies of pre-nuptial and ante-nuptial agreements entered into by Mr. Irvine with his wife Katharine Brown Irvine, and copies of trust indentures executed by him during his lifetime, and other documents which disclose how meticulous and careful Mr. Irvine was with reference to having all of the transactions involved with his property holdings and business interests definitely stated in said various legal documents and reflected by entries in his books of account. These documents are referred to in said Exhibit B-15 [Tr. 2084], as Exhibits G-1, G-7, G-8, G-9, G-9A, G-10, G-11, G-12, G-13, G-14, G-15, G-16; also Exhibits G-17 to G-23, inclusive,

which refer to cash gifts made by James Irvine, and Exhibit G-25, which is a deed of gift from James Irvine to The James Irvine Foundation.

The minutes of the meetings of stockholders and directors of The Irvine Company were introduced in evidence as Exhibit 2 [Tr. 3647]. These minutes commence with the directors meeting held June 3, 1935, and conclude with the last meeting of the board of directors that was held on April 28, 1947. James Irvine died on August 24, 1947. These minutes all disclose that no change whatever took place with reference to the ownership by James Irvine and his control over the 510 shares of Irvine Company stock that is described in the 1937 indenture of trust from the first meeting on June 3, 1935, to the last meeting on April 28, 1947. At no place in said minutes is there any indication whatever that The James Irvine Foundation, as trustee, had any interest in or title to the 510 shares of Irvine Company stock. During the period from 1937 to 1947, although Myford Irvine was the "dummy" president of The Irvine Foundation and as such acted for his father James Irvine, Myford Irvine, although a substantial stockholder himself in The Irvine Company as well as a director and vice-president thereof, never attended a single meeting—either the special or the annual meetings—of the stockholders of The Irvine Company, and Myford Irvine attended only two meetings of the board of directors of The Irvine Company during the said 10-year period.

Copies of the income tax returns of The Irvine Company during the period 1937 through 1948 are further cumulative evidence that during said period Mr. Irvine owned 547 shares of the stock of The Irvine Company, and that the defendant Foundation, as trustee, had no interest in or title to the 510 shares of Irvine Company stock during said period [Ex. 3,

Tr. 3647]. The minutes of a special meeting of the directors of The James Irvine Foundation held on September 19, 1947, following the death of Mr. Irvine on August 24, 1947, further establish that said defendant Foundation, as trustee, never claimed that it held any interest in or title to the said 510 shares of Irvine Company stock during the lifetime of Mr. Irvine [Ex. A-14, Tr. 3678]. Said 510 shares of Irvine Company stock were not transferred to the Irvine Foundation on the books of The Irvine Company until November 13, 1947 [Ex. D-1, Tr. 2325] when a certificate of stock for 510 shares was first issued to the Irvine Foundation [Ex. 21, Tr. 2814]. During the lifetime of James Irvine he never filed a copy of the 1937 indenture of trust with the Irvine Company or sent any communication of any kind to the Irvine Company concerning the execution by him of the 1937 indenture of trust or that it even existed. On November 11, 1947 a copy of said indenture of trust was sent by E. M. Price, as secretary to the executors of the Estate of James Irvine, to Mr. Hellis as secretary of The Irvine Company [Ex. D-3, Tr. 2937].

During the 10-year period following the execution of the 1937 indenture of trust James Irvine not only owned the 510 shares of Irvine Company stock that was described in said indenture of trust and which he voted as the owner and holder of said shares either in person or by proxy at every annual stockholders meeting held by The Irvine Company during said 10-year period but, in addition thereto, he voted either as trustee or by proxy every other share of Irvine Company stock outstanding, including the remaining 490 shares, to wit, 200 shares which he held as trustee and voted for the plaintiff-appellant Athalie Irvine Smith, 50 shares which he held as trustee and voted for Kathryn Anita Lillard, 40 shares for the trustee Anglo-California Trust Company, and 200 shares that he voted by proxy for his son Myford Irvine, a total of 490 shares.

The business of The Irvine Company was conducted as usual by James Irvine as the president and general manager thereof during said 10-year period, the same as the affairs of the said Irvine Company had been managed and controlled by Mr. Irvine since the year 1894 when the Irvine Company was incorporated and James Irvine became the president thereof and continuously thereafter during his lifetime served as the owner president thereof during said period. As such president and general manager, The Irvine Company during said 10-year period produced agricultural crops and carried on the other business connected with the operation of the Irvine Ranch and received therefrom the total amount of nineteen million, six hundred twenty-seven thousand, four hundred seventy-one dollars (\$19,627,471) [Ex. 3, Tr. 3647]. The services and efforts of James Irvine during said 10-year period as the controlling individual stockholder and trustee stockholder and president of The Irvine Company were certainly responsible for the very substantial amount of money the corporation received and which indicates the extent of the ownership interest and activity of Mr. Irvine in The Irvine Company during said 10-year period that is in question in this case.

Extracts from the following cases in support of the law that is applicable to the foregoing statements of the cumulative evidentiary facts that established the ownership by Mr. Irvine of the 510 shares of Irvine Company stock during his entire lifetime are set forth in the Appendix to appellant's brief, to wit:

Blackburn v. Drake, 27 Cal. Rptr. 651;

Obranovich v. Stiller, 34 Cal. Rptr. 923;

Lawson v. Lowengart, 50 Cal. Rptr. 186;

Atl. Nat. Bank of Jacksonville, v. St. Louis Union Tr. Co., 211 S.W. 2d 2.

The Absence of Any Acts of Ownership or Dominion by the James Irvine Foundation, as Trustee, Over the 510 Shares of Irvine Company Stock During the 10-Year Period of James Irvine's Lifetime Following the Execution of the Indenture of Trust When Coupled With the Exercise of Acts of Ownership and Dominion Over the Irvine Company Stock During Said 10-Year Period by James Irvine Lead to the Conclusion That the Irvine Company Stock Was Not Delivered by James Irvine to the James Irvine Foundation, as Trustee, With the Intent That the Title Thereto and the Ownership and Dominion Thereover Would Be Effective Immediately or at All During the Lifetime of James Irvine.

The minutes of the meetings of the members and directors of The James Irvine Foundation during the period 1937-1947 disclose that no business whatever was transacted by said Irvine Foundation following the execution of the Irvine indenture of trust on February 24, 1937 until after the death of James Irvine on August 24, 1947 [Ex. A-14, Tr. 3678]. The first meeting of the incorporators of the Irvine Foundation was held on February 1, 1937 in the office of James Irvine, 820 Crocker Building, San Francisco, California, which was the paper office that the Irvine Foundation continued to use during said 10-year period.

We have heretofore alluded to the fact that the Irvine Foundation and The Irvine Company were both *alter egos* of James Irvine. The Irvine Foundation was controlled and directed by Mr. Irvine to the same absolute degree that he controlled The Irvine Company during his entire lifetime. The directors of the Irvine Foundation Corporation and the officers thereof, to

wit, his son Myford Irvine and his confidential secretary Miss E. M. Price, who were "dummy" president and "dummy" secretary-treasurer, and his employee Paul A. Dinsmore, who Mr. Irvine named as the "dummy" vice president but who had no duties as such, all of whom were placed in their respective positions because they were the employees, agents and "dummy" officers and directors of Mr. Irvine.

Equity looks through form to substance and there was no legal difference whatever between James Irvine, the individual, and his two corporate entities, *i.e.*, The Irvine Company and The James Irvine Foundation. These corporations existed in paper name only and were at all times merely the vehicle or device that James Irvine used to transact his own personal business. From the first meeting of the Foundation corporation directors on February 1, 1937 to the meeting on June 10, 1947, the last meeting held before the death of James Irvine, the Irvine Foundation corporation transacted no business except to adopt resolutions accepting donations that were made to the Foundation corporation as outright gifts by James Irvine. Mr. N. Loyall McLaren testified that Mr. Irvine attended all of these meetings [Tr. 77-78].

The books and records of account of the Irvine Foundation corporation [Ex. A-76 and A-77, Tr. 2088] establish that the Irvine Foundation corporation received no money or property from any source other than James Irvine or his *alter ego* The Irvine Company. These cash donations which were deposited in the bank account of the Irvine Foundation corporation amounted to nothing more than a re-deposit by Mr. Irvine of said cash donations from his own name to the name of the Irvine Foundation corporation. Said cash donations, which commenced in December, 1937 and ended in 1947,

amounted to a total sum of \$166,000. that came directly from James Irvine and a further sum of \$40,000. that came from The Irvine Company. This money was held by the Irvine Foundation corporation as capital assets. Not one single dollar from the \$166,000. donated by James Irvine personally was distributed during the lifetime of Mr. Irvine or subsequent thereto for charitable purposes. In addition to these cash donations Mr. Irvine made two real property gifts to the Irvine Foundation corporation which were carried on the books of the Foundation corporation at the value of \$52,500.

Although the Irvine Foundation corporation ostensibly commenced business on February 1, 1937, it made no charitable contributions until November 30, 1938, when the sum of \$1,000. was contributed to the San Francisco Community Chest. During the 10-year period, 1937-1947, charitable contributions were made by the Foundation corporation in the aggregate amount of \$28,450. The books and records of account of the Irvine Foundation corporation [Ex. A-76, A-77, Tr. 2088] during said 10-year period further disclose that the Foundation corporation had no current obligations or disbursements connected with any matters that were transacted in the office of James Irvine. No rent was paid to James Irvine for the 10-year use of his office by the Foundation corporation. The Foundation corporation did not have a telephone of its own nor did it pay any service charge for the use of Mr. Irvine's telephone. It purchased no stationery or letter-heads, bought no postage stamps, had no petty cash fund for sundry items such as messenger service, pencils, erasers, etc., and had no equipment of any kind that could be utilized for any business purpose to be transacted by the Foundation corporation for the reason that the Foundation corporation had no business

to transact during the said 10-year period. The Foundation corporation nominally paid Miss E. M. Price, who had been the confidential secretary for James Irvine since 1917, a small stipend for her minimal clerical services such as making bank deposits in the savings accounts and other minor matters that were attended to by her. Miss E. M. Price as the "dummy" secretary-treasurer of the Foundation Corporation did not receive any compensation for her services as such officer. She was continuously during said 10-year period in the employ and on the personal payroll of James Irvine as his confidential secretary. Commencing with the fiscal year 1940-1941 Miss Price received a lump sum of \$75.00 for her incidental clerical services on behalf of the Foundation corporation, and for the period commencing with the fiscal year 1941-1942 and ending with the fiscal year 1946-1947, she received \$120.00 per year in the form of a monthly stipend of \$10. This rate of compensation to Miss Price indicates that as Mr. Irvine's "dummy" secretary-treasurer of the Irvine Foundation corporation for said 10-year period prior to the death of Mr. Irvine, she devoted practically none of her time to her ostensible position as secretary-treasurer of said corporation for the obvious reason that there was nothing for her to attend to.

No salary or compensation was paid by the Irvine Foundation corporation to any of its officers during said 10-year period. Neither Myford Irvine, as the "dummy" president for his father, nor Paul A. Dinsmore, as the "dummy" vice president for his employer James Irvine, received any money as compensation for his services and this was proper because neither of said officers rendered services of any kind to the Irvine Foundation corporation and there was no requirement for them to do so. Both of these indivi-

duals were on the personal payroll of Mr. Irvine or The Irvine Company, his *alter ego*, during the said 10-year period. It is therefore obvious that the entire operation of The James Irvine Foundation corporation during said 10-year period amounted to nothing more than the use of said Foundation corporation's name by James Irvine as his *alter ego* and as an agency vehicle or conduit to receive from him certain sums of money and real estate as his tax-deductible charitable contributions which thereby gave an illusory front to the Irvine Foundation as a charitable corporation. There was no difference between what the Irvine Foundation corporation indirectly did during said 10-year period and what James Irvine himself could have directly done personally and with a far more beneficial result had his donations been given directly to charity instead of being frozen into the capital assets of his *alter ego*, The James Irvine Foundation. In fact, when the veil is pierced and the form ignored and the real substance behind The James Irvine Foundation is placed in its right perspective we find that said corporation was but another name for James Irvine. It transacted no business whatever except the business of James Irvine during said 10-year period, and the relationship between James Irvine and said Foundation corporation during said 10-year period was strictly that of principal and agent or at the most James Irvine the man and his shadow or *alter ego*, which was called The James Irvine Foundation, a corporation. It is to be noted that the word "charitable" is not included in the name of said The James Irvine Foundation, a corporation. It was nothing more than a device that permitted Mr. Irvine to eat his cake and have it too. When the Irvine Foundation corporation ostensibly commenced business on February 1, 1937, the date of the first

incorporators meeting, and until December 31, 1937, it had no bank account and no money. Although the books of account of said corporation [Ex. A-76, A-77, Tr. 2088] show the first entry as being the receipt of \$5,000. on December 31, 1937 as a gift from James Irvine, said books of account disclose that they were not purchased by the Irvine Foundation corporation until April 29, 1938 as the entry in the cash book reflecting this purchase indicates that said books of account were bought from A. Carlisle & Co. on said date for the sum of \$3,40. It is therefore clear that said Irvine Foundation was without funds of any kind until James Irvine made his cash gift of \$5,000. on December 31, 1937, which year-end gift was made by Mr. Irvine as a charitable income tax deduction which he took on his personal income tax return for the year 1937. Under these circumstances and from the entries in the Irvine Foundation corporation's cash book, ledger and journal, and as disclosed by the minutes of the meetings of the members and directors of the Irvine Foundation corporation during said 10-year period, one conclusion only can be reached, and that is that The James Irvine Foundation, as trustee, was a paper myth or ghost trustee that had no real existence and possessed no powers or had any duties whatever during said 10-year period, and that the purported trust created by the Irvine indenture of trust dated February 24, 1937 had no life, no vitality or energy and was not operative or absolute during the lifetime of James Irvine.

There is not a single entry in said books of account or in the minutes of the members and directors meetings of said Foundation corporation that discloses that any business at all was transacted by the Irvine Foundation, as trustee, under the said Irvine indenture of

trust during the lifetime of James Irvine or that any powers or duties were vested in or performed by said Irvine Foundation, as trustee, until after the death of James Irvine on August 24, 1947. James Irvine had first to die before his ghost trustee could walk. Each cash gift made by James Irvine to the Foundation corporation during said 10-year period was accompanied by a letter, and each of said letters was copied into the minutes of the members and directors meetings of said Foundation corporation during said 10-year period. In each of said letters James Irvine stated that the donation was a gift absolute to the Foundation corporation and specifically not subject to the terms of the post mortem indenture of trust. It is therefore clear from each of said letters that James Irvine intended that the records of the Foundation corporation, which he controlled, would show that each such donation was a gift absolute to the Foundation corporation and was to be separate from the post portem provisions of the Irvine indenture of trust which was not to be operative or absolute until after his death.

The District Court, in its Memorandum which also contained the said Court's findings of fact, made the following reference to the outright gifts that James Irvine made to the Irvine Foundation, as follows:

“James Irvine made a number of gifts to the Foundation which do not involve the stock of The Irvine Company. Those gifts are not involved. There was not involved the status of The James Irvine Foundation. It was and is a valid charitable corporation.” [R. 155].

The books and records of account of the Irvine Foundation Corporation do not bear out the statement of the District Court to the effect that said corporation was

and is a valid charitable corporation because during said 10-year period, out of the personal cash gifts of James Irvine totalling \$166,000., for which he took a deduction on his income tax returns for each year in which said gifts were made, not one dollar thereof found its way to a single charity. The only money that was distributed to charitable organizations or purposes during said 10-year period was in the total amount of \$28,450., which was derived solely from rentals received by said Foundation corporation from the real estate donated to it by Mr. Irvine [Ex. A-76, A-77, Tr. 2088]. This small amount of rental income was all that was distributed to charity over said 10-year period and gives doubtful support to the legitimacy of the said Foundation corporation as a valid charitable corporation. Inasmuch as James Irvine took deductions as charitable contributions for the full amount of his said donations to the Foundation corporation, the full amount thereof in kind should have been passed on to needy charitable organizations and not retained by the Foundation corporation as a capital asset. His entire donations, both cash and real estate, were treated as deductible charitable contributions on his income tax returns during said 10-year period, when in truth not one dollar thereof ever found its way to charity.

The practice followed by James Irvine in making said cash and real property donations to the Irvine Foundation corporation and the freezing thereof into capital assets bears out the contention of the appellant that it was the intention of Mr. Irvine in connection with the inclusion of paragraph 2 in the indenture of trust, that the post mortem Foundation corporation trustee was to invest each year, in perpetuity, all or part of the dividend income received from the Irvine Company stock in order to build up the corpus of the trust, and

this intention of Mr. Irvine conclusively established that said trust was a private and noncharitable trust which was illegal and void as being in violation of the law of perpetuities and restraints on alienation.

After the first meeting of the incorporators of The James Irvine Foundation on February 1, 1937, a meeting of the members and directors of said corporation was held, on May 25, 1937, at which meeting there was adopted a resolution that approved the purported execution of the indenture of trust dated February 24, 1937, by Myford Irvine as his father's "dummy" president and by E. M. Price as Mr. Irvine's "dummy" secretary-treasurer of said Foundation corporation, and approved the purported acceptance of the trusts described in said indenture of trust, to wit, both the non-charitable and the charitable trusts contained therein, and the purported delivery of the Irvine Company stock to the Irvine Foundation, as trustee, by said "dummy" officers, and at a meeting on December 31, 1937, received a cash donation from James Irvine of \$5,000, and on December 31, 1938 accepted an additional cash donation of \$8,000. and certain real estate, yet no income tax returns were filed by said Irvine Foundation corporation for the years 1937 and 1938. On June 14, 1939 said Foundation corporation—but not as trustee—filed its first income tax return. No Irvine's stock assets were listed therein and no reference whatever was made to either the 1937 Irvine indenture of trust or the purported transfer of 505 shares of Irvine Company stock to The James Irvine Foundation, as trustee [Ex. A-21, Tr. 3681]. No copy of the Irvine indenture of trust was ever filed with the Treasury Department during the lifetime of James Irvine, as required by law and the instructions and regulations of the Internal Revenue Bureau [Tr. 2878].

After filing its first income tax return on June 14, 1939, an application was made by the James Irvine Foundation corporation—but not as trustee—for exemption from federal income taxation. On November 9, 1939 the Treasury Department acknowledged the receipt of said application in a communication addressed to The James Irvine Foundation, Room 820, Crocker Building, San Francisco, California, which was the personal office of James Irvine. The Treasury Department stated in said letter that said application presented evidence that James Irvine contributed \$5,000. to the corporate fund in 1937, and that in 1938 he contributed additional cash and real estate. It is therefore apparent from said Treasury Department letter that said application of the Irvine Foundation corporation made no reference whatever to (1) the 1937 Irvine indenture of trust under which the Irvine Foundation corporation was the purported trustee, and (2) no mention whatever was made to any Irvine Company stock, particularly 505 shares of such stock, having been transferred by Mr. Irvine, in trust, to said Irvine Foundation corporation, as trustee. The absence in said application of any declaration or act indicating an ownership interest by the Irvine Foundation, as trustee, in the 505 shares of Irvine Company stock is cumulative additional evidence that said Irvine Company stock was not transferred to said Irvine Foundation corporation, as trustee, by Mr. Irvine, at any time during the lifetime of James Irvine.

Following the filing of its first income tax return on June 14, 1939, said Irvine Foundation corporation for each fiscal year thereafter during the lifetime of James Irvine, to wit, to and including April 30, 1947, made no reference in any of said income tax returns to said 1937 indenture of trust or the 505 shares of

Irvine Company stock having been transferred by Mr. Irvine to the Irvine Foundation, as trustee. Mr. Edward H. Cassells, Jr., an attorney at law who was associated with the law firm of O'Melveny & Myers of Los Angeles, California, testified and read into the record certain income tax laws and instructions and regulations that were applicable to charitable corporations as a trustee during the period 1936 through 1947. Mr. Cassells' testimony is set forth in Volume 16, pp. 3557-3575, incl. of the Reporter's Transcript, and includes verbatim the rules and regulations and income tax provisions that Mr. Cassells' testified were applicable to The James Irvine Foundation, as trustee, during said period 1936-1947. Under these income tax instructions and regulations and the applicable income tax laws referred to by Mr. Cassells it appeared without contradiction that the Irvine Foundation, as trustee, was required by law and by said instructions and regulations to have filed a copy of the Irvine indenture of trust with the Treasury Department.

Mr. Charles N. Whitehead, who was a partner in Mr. N. Loyall McLaren's accountion firm, testified that no copy of the said indenture of trust was filed with the Treasury Department during the lifetime of Mr. Irvine [Tr. 2878]. The testimony and documentary evidence produced by Mr. Cassells further established that the purported donation and gift by James Irvine of the said Irvine Company stock to the Foundation corporation, as trustee, was also required by the income tax laws and the regulations issued thereunder to be included in the schedule of assets or in a balance sheet that was required to be attached to each of the income tax returns during the period 1937-1947. None of the income tax returns of said Irvine Foundation,

as trustee, during said 10-year period disclosed in the schedule of assets or in any balance sheet attached thereto any reference to said Irvine Company stock as having been transferred by James Irvine to the Irvine Foundation, as trustee, nor was any claim made by said Irvine Foundation, as trustee that it had any interest whatever in the said 505 shares of Irvine Company stock. Again, the absence of any declaration or act by the Irvine Foundation, as trustee, in its income tax returns concerning its alleged ownership, as trustee, of the 505 shares of Irvine Company stock during the lifetime of James Irvine is substantial cumulative evidence that James Irvine never intended to transfer the Irvine Company stock or to vest any title, right, power or privileges thereto in the Irvine Foundation, as trustee, during his lifetime, as expressly provided in paragraph 3 of the indenture of trust, as follows:

“To carry out the express purpose of this trust and in aid of its execution and the proper administration, management and application of the trust property, the Trustee is vested, *after the death of the Trustor*, with the following additional powers and discretions:

“1. To have respecting the shares of stock hereinabove described and all other securities which may be held in this trust, all the rights, powers and privileges of an owner * * *”

Notices of regular meetings of the members and directors of The James Irvine Foundation are all on the personal letterhead stationery of James Irvine, copies of which are incorporated in the minutes of the mem-

bers and directors meetings held May 22, 1939, April 18, 1945, December 7, 1945, June 12, 1946, and June 10, 1947 [Ex. A-14, Tr. 3678]. These communications from E. M. Price, signed by her as Secretary of The James Irvine Foundation corporation, on the personal letterhead stationery of James Irvine, Crocker Building, San Francisco 4, California, clearly established that James Irvine and The James Irvine Foundation were one and the same person. It further appears from the minutes of the meetings of the members and directors of the Foundation corporation that Myford Irvine, "dummy" president, when sending communications to the directors also used the personal letterhead stationery of his father James Irvine, as evidenced by his letter dated April 17, 1945 [Ex. A-14, Tr. 3678]. The first notice sent by E. M. Price on the personal letterhead stationery of James Irvine was dated May 22, 1939, and the last notice sent by her, was dated on or about June 10, 1947, and gave notice of the regular annual meeting of the members for June 10, 1947. This is further substantial evidence that during the entire 10-year period of Mr. Irvine's lifetime the Irvine Foundation corporation was nothing more than his *alter ego*, and as such *alter ego* the officers and directors thereof, who were his agents and employees, and who were known in corporation law as "dummies", were dominated and controlled absolutely by James Irvine.

Mr. N. Loyall McLaren, as president of The James Irvine Foundation corporation, corroborated the contention of the plaintiff-appellant that James Irvine

never intended that title to or any rights, powers, privileges or interest in the 510 shares of The Irvine Company stock would become vested in said corporation as trustee until after the death of Mr. Irvine through the issuance of the following official statements that were contained in a letter dated February 2, 1965, to Wilbur D. Mills, Chairman, Committee on Ways and Means, to wit:

“From 1947 when the Foundation’s rights in the stock vested until March 31, 1965, The Irvine Company paid to its shareholders in the form of dividends 89.1 percent of its operating income.

“Since this Foundation has owned more than 50% of The Irvine Company stock since 1947, it is appropriate to evaluate the compulsory divestiture proposal in the terms of the results that reasonably may be expected from its application to this corporation.” [Ex. A-78, Tr. 2172].

On December 5, 1961, when Mr. McLaren was president of The James Irvine Foundation he issued a press release which stated as follows:

‘The James Irvine Foundation holds controlling interest in The Irvine Company. Upon the death of James Irvine on August 24, 1947 the Foundation became the owner of 51% of the stock of The Irvine Company, the principal asset of which is the Irvine Ranch located in Orange County, California.

* * *

“From 1947, when the Foundation’s majority stock ownership vested, until March 31, 1965, The Irvine Company paid out 89.1 percent of its net income after taxes to its shareholders in dividends.” [Ex. A-51, Tr. 1425].

The 1957 Indenture of Trust Created a Mere Agency and Not a True Trust.

In different parts of Appellant's brief reference has been made to Myford Irvine and to E. M. Price as the "dummy" president and the "dummy" secretary-treasurer of The James Irvine Foundation, who were selected for said positions by James Irvine when the Irvine Foundation held its first meeting of the members and board of directors of said corporation on February 1, 1937. Both Myford Irvine, the only surviving son of James Irvine, and E. M. Price had been the employees and agents of James Irvine since 1920 and continuously thereafter until Mr. Irvine's death on August 24, 1947.

The word "dummy" in this brief is used in its legal corporation definition, and so is the word "tool" used in its legal agency definition. Both words imply that Myford Irvine and E. M. Price were not independent directors or officers of the Irvine Foundation corporation, but that they held their respective offices as the employees and agents of James Irvine and received their salaries from either James Irvine or The Irvine Company, the *alter ego* of James Irvine, and that as such agents or employees both Myford Irvine and E. M. Price were subject at all times to the Superior control and directions of their employer and principal, James Irvine.

Robert H. Gerdes, who acted as the attorney for James Irvine during his lifetime and who drew Mr. Irvine's last will and testament, testified as follows concerning the agency relationship between James Irvine and E. M. Price, to wit:

“She was in the office of Mr. Irvine and acted as secretary and handled many of the details of his affairs and I knew her almost from the time that I knew Mr. Irvine or maybe even before.” [Tr. 1822]

Mr. N. Loyall McLaren, president of The James Irvine Foundation, gave the following testimony concerning the agency relationship between James Irvine and E. M. Price:

“Miss E. M. Price had been Mr. Irvine’s personal secretary for a great many years. Mr. Irvine also had an office secretary, Mr. T. V. Maxwell, who was in general charge of the office. Upon the retirement of Mr. Maxwell, a number of years—I don’t recall the exact number—before the creation of the Foundation, Mr. Irvine promoted Miss Price to be the office manager as well as his secretary.” [Tr. 51].

The deposition of Mr. George L. Beaubien was read into the record by the defendant Irvine Foundation. Mr. Beaubien testified that he entered the employ of James Irvine as a bookkeeper in 1917 [Tr. 890]. That Mr. Irvine’s office was at 820 Crocker Building, San Francisco, when Mr. Beaubien entered his employ as a bookkeeper. Mr. Beaubien continued to work for James Irvine as bookkeeper from 1917 up until the date of his death [Tr. 891]. That during that entire period of time James Irvine’s offices were at 820 Crocker Building [Tr. 892]. That when Mr. Beaubien first went to work in the office of James Irvine, Mr. T. V. Maxwell was Mr. Irvine’s secretary and Miss E. M. Price was a stenographer in the office of James Irvine [Tr. 893].

That later Myford Irvine came into the office someplace in the 20's, probably the early part of 1920 [Tr. 894]. That during the period 1917 through 1947 when Mr. Irvine died, no one else worked in the office except the ones that Mr. Beaubien had mentioned [Tr. 893]. During the period from 1937 to 1947 James Irvine had personally several safe deposit boxes in the Crocker Bank [Tr. 897]. That during the 10-year period before the death of James Irvine in 1947, Myford Irvine and Miss E. M. Price took care of putting things in and taking things out of the safe deposit boxes of James Irvine in the Crocker Bank [Tr. 902]. See also Exhibits A-65, Tr. 561, and A-66, Tr. 565, representing the agency authority that was separately vested in Myford Irvine and E. M. Price to have access to the safe deposit boxes of James Irvine in the Crocker Bank.

Extracts from the Law of Agency which are applicable to the evidence in this case that relates to the agency relationship between James Irvine and Myford Irvine and E. M. Price and The James Irvine Foundation, are set forth in the appendix to appellant's brief.

James Irvine Died Intestate as to the 510 Shares of the Irvine Company Stock That Are Described in the 1937 Irvine Indenture of Trust.

On May 14, 1946, James Irvine executed his last will and testament. This will was prepared by Robert H. Gerdes, who first became Mr. Irvine's attorney in 1936 when Mr. Gerdes was a partner in the law offices of Chaffee E. Hall in San Francisco. Mr. Gerdes was named as one of the executors and trustees in Mr. Irvine's last will and testament. Mr. Gerdes testified at

the trial concerning the discussions which took place between himself and James Irvine in connection with the preparation of Mr. Irvine's last will and testament.

N. Loyall McLaren, president of The James Irvine Foundation and the tax adviser of Mr. Irvine during his lifetime, also testified at the trial concerning several discussions which took place between himself and Mr. Irvine with reference to the planning of Mr. Irvine's estate.

The above mentioned testimony of Mr. Gerdes and Mr. McLaren is set forth in the appendix to appellant's brief.

Mr. Theodore R. Meyer, who was the attorney for Mrs. Athalie R. Clarke, as the guardian of the plaintiff Athalie Irvine Smith in connection with the estate of James Irvine, deceased, also testified at the trial at the request of defendant The James Irvine Foundation. During the examination of Mr. Meyer, he was requested to identify Exhibit B-21 [Tr. 699]. This exhibit was a copy of a memorandum dated October 13, 1950 prepared by Mr. Chaffee E. Hall who was the attorney for the executors of the Estate of James Irvine Deceased. Mr. Meyer's attention was directed to paragraph 11, page 8 of said Exhibit B-21, which reads as follows:

"Mr. Meyer as attorney for Athalie (plaintiff-appellant) suggests that equitably some part of the inheritance tax imposed on Athalie on account of the James trust should be borne by the other family unit. His position, as we understand it, is that if Athalie is the only one of the children or grandchildren required to pay a tax on an inter vivos

transfer Irvine's intentions with respect to the apportionment of his estate among his descendants would be frustrated."

With reference to the foregoing statement Mr. Meyer was asked the following question:

"What facts did you have that you apparently stated to Mr. Hall that he has referred to in this paragraph 11 with reference to 'Irvine's intentions with respect to the apportionment of his estate among his descendants would be frustrated?'"

Mr. Meyer gave the following answer:

"This happened a long time ago, Mr. Young. I am having some difficulty bringing back anything more than appears in the papers, but it seems to me that our argument was basically that Mr. Irvine, Sr. must have had in mind a general testamentary scheme comprehending the inter vivos transfers and the bequests under his will, and he would not have intended, for example, that Athalie's 200 shares would bear an inheritance tax and Myford's 200 shares should not."

It is apparent from the testimony of Messrs. Gerdes, McLaren and Meyer that Mr. Irvine never intended that in the event the 1937 indenture of trust was rendered invalid that the 510 shares of Irvine Company stock would come under the trust provisions of his 1946 last will and testament, and it therefore follows that James Irvine died intestate with reference to the 510 shares of Irvine Company stock and that said Irvine Company stock, which now consists of 459 shares, belongs to the

surviving heirs of James Irvine in the following proportions, to wit:

Athalie Irvine Smith, daughter of James Irvine III, who died in 1935, and granddaughter of the decedent James Irvine, one-third ($\frac{1}{3}$), or 153 shares of said 459 shares; Kathryn Lillard Wheeler, daughter of Kathryn Irvine Lillard, who died in 1920, and granddaughter of the decedent James Irvine, one-third ($\frac{1}{3}$) or 153 shares; and Linda Irvine Gaeda and James Myford Irvine, the daughter and son of Myford Irvine, who died in 1959, and the granddaughter and grandson of the decedent James Irvine, one-third ($\frac{1}{3}$) or 153 shares jointly, or $76\frac{1}{2}$ shares to each.

Conclusion.

It is respectfully submitted that the judgment of the District Court is against the substantial evidence and the law, and therefore said judgment should be reversed with directions to the District Court to enter judgment for the appellant that:

1. The indenture of trust between James Irvine, trustor, and The James Irvine Foundation, trustee, dated February 24, 1937, was void *ab initio*;

2. The defendant The James Irvine Foundation holds the 459 shares of the stock of The Irvine Company on a resulting trust for the legal heirs of James Irvine, Deceased;

3. The defendant The James Irvine Foundation and the defendant directors, members and trustees thereof be required, jointly and severally, to account to the appellant and the other legal heirs of James Irvine, De-

ceased, for all dividends, capital gains and other fruits received by said defendants above referred to from the 459 shares of The Irvine Company stock, together with interest thereon;

4. The defendant The Irvine Company be directed to cancel the said certificate for 459 shares of The Irvine Company stock standing in the name of The James Irvine Foundation, and to re-issue from said cancelled certificate 153 shares of The Irvine Company stock to appellant Athalie Irvine Smith, 153 shares of The Irvine Company stock to Kathryn Lillard Wheeler, and 76½ shares each of The Irvine Company stock to Linda Irvine Gaede and James Myford Irvine; and

5. Appellant have such other relief as the court considers appropriate to carry out the judgment of this court.

Respectfully submitted,

LYNDOL L. YOUNG,
*Attorney for Plaintiff-Appellant
Athalie Irvine Smith.*

Dated: May 29, 1968.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LYNDOL L. YOUNG,

APPENDIX.

Page References to the Reporter's Transcript Where
the Exhibits of the Parties Are Identified, Of-
fered, and Received or Rejected as Evidence.

PLAINTIFF'S EXHIBITS:

<u>No.</u>	<u>Iden.</u>	<u>Rec'd</u>	<u>No.</u>	<u>Iden.</u>	<u>Rec'd</u>
2		3647			
3		3647	16		264
4		3647	17		265
5		1493	18		266
8		3649	19		267
11		3650	20		2066
12		223	21		2814
13		236	22		3003
14		243	23		3657
15		246			

DEFENDANT'S EXHIBITS:

<u>No.</u>	<u>Iden.</u>	<u>Rec'd</u>	<u>No.</u>	<u>Iden.</u>	<u>Rec'd</u>
A		3674	A-40	110	3686
A-1		3674	A-41	110	3687
A-2		1414	A-42	110	3687
A-3		3675	A-43	110	3687
A-4		3675	A-44	110	3688
A-5		3675	A-45	110	3688
A-6		3676	A-46	110	3689
A-7		3676	A-47	110	
A-8		3676	A-48	110	3689
A-9)			A-49	110	3689
A-10)		3677	A-50	98	3690
A-11)			A-51	168	1425
A-12)			A-52	427	3690
A-13		3678	A-53	427	3690
A-14		3678	A-54	428	3690
A-15	30	3679	A-55	428	3691
A-16	31	3679	A-56	452	461
A-17	37	3680	A-57	456	461
A-18	37	3680	A-58	461	461
A-19	38	3680	A-59		538
A-20	40	3680	A-60		549

DEFENDANT'S EXHIBITS (Continued) :

<u>No.</u>	<u>Iden.</u>	<u>Rec'd</u>	<u>No.</u>	<u>Iden.</u>	<u>Rec'd</u>
A-21	43	3681	A-61		550
A-22	44	3681	A-62		553
A-23	44	3681	A-63		554
A-24	45	3628	A-64		559
A-25	45	3628	A-65		561
A-26	62	3628	A-66		565
A-27	63	3683	A-67		567
A-28	110	3683	A-68		572
A-29	110	3684	A-69		575
A-30	110	3684	A-70		576
A-31	110	677	A-71		577
A-32	110	3684	A-72		595
A-33	110	3685	A-73		737
A-34	110	3685	A-74		932
A-35	110	3685	A-75		934
A-36	110	736	A-76		2088
A-37	110	3684	A-77		2088
A-38	110	3686	A-78		2172
A-39	110	3686			
B		2081	B-47		767, 778
B-1		1122	B-48		779
B-2	652	653	B-49		825
B-3		1126, 477	B-50		826
B-4		1127	B-51		873
B-5		2081, 2942	B-52		874
B-6		1129	B-53		874
B-7		2081, 2942	B-54		884
B-8		1130	B-55		1119
B-9		1133	B-56		1120
B-10		2082	B-57		1135
B-11		2082	B-58		1145
B-12		2082	B-59		1148
B-13		2082	B-60		1153
B-14		2083	B-61		1155
B-15		2084	B-62		1162
B-16		1138	B-63		1168
B-17		1141	B-64		1169
B-18		1142	B-65		1177
B-19		1143	B-66		1179
B-20		1144	B-67		1180
B-21		699	B-68		1182
B-22		699	B-69		1184

DEFENDANT'S EXHIBITS (Continued) :

<u>No.</u>	<u>Iden.</u>	<u>Rec'd</u>	<u>No.</u>	<u>Iden.</u>	<u>Rec'd</u>
B-23		1154	B-70		1185
B-24		1154	B-71		1187
B-25		752	B-72		1187
B-26		764	B-73		1194
B-27		770	B-74		1197
B-28		775	B-75		1198
B-29		687	B-76		1246
B-30		722			
B-31		679			
B-32		681	C		3371
			C-1		3372
B-34		709	C-2		764
B-35		741	C-3		3375
B-36		753	C-4		3261
B-37		754	C-5		3262
B-38		763	C-6	3198	3221
B-39		765	C-7		3253
B-40		766			
B-41		769	C-9		3298
B-42		770			
B-43		775			
B-46		778			
D		2193	G-11	1584	3695
D-1		2325	G-12	1584	3698
D-2		2328, 2942	G-13	1584	3698
D-3		2937	G-14	1585	3697
D-4		2937	G-15	1585	3697
			G-16	1586	3697
D-6	163	1488	G-17	1586	3698
D-7	166	2089	G-18	1587	3698
D-8		1726	G-19	1588	3698
D-9		1961	G-20	1591	3698
D-10		1969	G-21	1591	3699
D-11		1969	G-22	1592	3699
D-12		1972	G-23	1593	3699
D-13		1973	G-24	1593	
D-14		2563	G-25	1593	3700

DEFENDANT'S EXHIBITS (Continued) :

<u>No.</u>	<u>Iden.</u>	<u>Rec'd</u>	<u>No.</u>	<u>Iden.</u>	<u>Rec'd</u>
			G-26	1594	3700
			G-27	1594	3701
E		2088	G-28	1594	3701
E-1		2089	G-29	1595	3702
E-2		2193	G-30	1596	3702
E-3		1397	G-31	1596	3702
E-4		1437	G-32	1599	3703
E-5		2126	G-33	1600	3703
E-6		2135	G-34	1600	3703
E-7		2159	G-35	1601	3704
E-8		2567	G-36	1603	3704
E-9		3187	G-37	1603	3704
			G-38	1604	3705
			G-39	1605	3705
F		1488	G-40	1605	3705
F-1		1488	G-41	1607	3706
F-2		1488	G-42	1607	3706
F-3		1488	G-43	1608	3706
F-4		1488	G-44	1609	3706
F-5		1488	G-45	1610	3707
F-6		1488	G-46		3707
			G-47	1612	3707
			G-48	1613	3708
G-1		1570	G-49	1614	3708
G-2		1575, 3692	G-50	1615	3708
G-3		1578, 3693	G-51	1616	3708
G-4		1578, 3693	G-52	1616	3709
G-5		1579, 3694	G-53	1616	3709
G-6	1580	3694	G-54	1617	3709
G-7	1580	3694	G-55	1618	3709
G-8	1581	3695			
G-9	1581	3695			
G-10	1582	3695			

Testimony of Richard C. O'Connor.

“Q Now, with reference to those provisions which you have just read from the copy of the trust document that was furnished to you, I understand that those were the particular provisions that you considered in reaching your conclusion as you have stated in this letter or your suggestion, as I read the letter, not a conclusion, your suggestion that the trust may have been or might have been an agency, is that right?

A That's right.

Q Now, in reaching that suggestion that you made in your letter of August 6, 1949 to Mr. Hall, did you give any consideration or did you assume that the certificates of stock Nos. 28, 33 and 42, Certificate No. 28 being for 332 shares of Irvine stock, Certificate No. 33 for 132 shares of Irvine stock and Certificate 42 for 41 shares had been effectively transferred and delivered to The James Irvine Foundation?

MR. PRIVETT: I object to that question. If the question is what did Mr. O'Connor assume at the time he wrote that letter, I think that is wholly irrelevant and immaterial, what Mr. O'Connor assumed.

MR. YOUNG: Well, he had the trust agreement before him. It is so stated there.

THE COURT: He may answer.

A I did so assume that it had been effectively delivered.

BY MR. YOUNG:

Q To The James Irvine Foundation?

A The Foundation.

Q Is that correct?

A Yes.” (Tr. 2616-2617)

“Q Thank you, sir. Now calling your attention, coming back again to the indenture of trust with which we are concerned here and which is referred to by paragraph fifth of your letter, had you known when you made this determination with reference to the non-taxability of the 1937 trust indenture, that Certificate No. 33 for 122 shares of Irvine Company stock and Certificate No.—

A 132.

Q—132 and Certificate No. 42 for 41 shares of stock were subsequent to February 24, 1937, to wit, in 1941, the year 1941 in the possession and under the control of Mr. Irvine, would that have had any effect on your determination that the 1937 trust was not taxable?

A Well, it would have strengthened my first suggestion that there was no actual trust but a mere agency created by this instrument of February 24, 1937, because it would appear that Mr. Irvine had control over not merely income and powers reserved, but over the actual corpus of the trust and if he reserved that, there is the fundamental thing, I certainly would have been slower to recede from the suggested position that I set forth in that letter.

Q Well, had that situation been brought to your attention, that is, the facts as I have related them in connection with Mr. Irvine having possession of those two certificates of stock representing 173 shares of The Irvine Company stock, what would you have done about it?

MR. PRIVETT: Your Honor, I must interpose just a formal objection and preserve the record here. This time, rather than stating it as an assumption, Mr.

Young has stated this as being a fact. There is no evidence in the record whatever to support Mr. Young's assertion of a fact that Mr. Irvine had these stock certificates in his possession in the forties.

THE COURT: It will be considered that he has assumed the fact, evidently.

MR. PRIVETT: Yes.

MR. YOUNG: Yes, your Honor, and also of course we had the testimony yesterday with reference to the certificates that I have just referred to being in his possession in 1941.

THE COURT: I mean you still have to deal with assumptions.

MR. YOUNG: That is right, your Honor, yes.

A Your question was whether, if I knew that he had them—

Q In 1941, which is four years subsequent to the date of the trust indenture.

A Yes.

Q Then what would you have done about it?

A It would have inclined me to the view more strongly than ever that no trust had been created, that he made a paper transfer merely of these shares, reserving the power to recall them when he wished, and that, therefore, they belonged in his estate and not in The Foundation." (Tr. 2619-2621, incl.)

* * * * *

"Q Mr. O'Connor, Mr. Privett referred to a letter in which you requested that you be furnished with Form 900, which I believe is the income tax return of a charitable corporation, is that right?

A Yes.

Q Were you furnished with that form?

A I believe I was. I believe it is in the file here.

MR. PRIVETT: I think that is Form 990.

THE COURT: 990.

MR. PRIVETT: 990?

BY THE WITNESS:

A Yes.

BY MR. YOUNG:

Q Is that the California form or the United States form?

A It is a federal form.

Q For what year is that?

A The year ending April 30, 1948.

Q That return, with the exception of a few months in 1947, May 1 to August 24, 1947 is all that represents the lifetime of Mr. Irvine, is that correct?

A That's right, I think.

Q He died on the 24th of August, 1947?

A Yes.

Q Were you furnished with any returns on this form 990 for The Foundation during the years from 1937 to May 1 or April 30, 1947?

A No. I am not sure that they were required as early as 1937.

Q You didn't receive any such returns?

A No.

Q At all, is that right?

A No, I did not.

Q If The James Irvine Foundation had made such returns to the United States Government and had not included in any one of those returns a single item or any indication at all with reference to its title to or ownership of 505 shares or 510 shares of Irvine Company stock, what would that have meant to you?

A It would have indicated to me that there would have been no transfer of that amount of shares to The Foundation.

Q Yes. And you have stated there was no such copy of any such return during those years furnished to you, is that right?

A Yes.

Q Mr. O'Connor, counsel, Mr. Privett read to you the indenture of trust of February 24, 1937, and you reread, as I understood it, the first clause there:

"The trustor hereby transfers, assigns and conveys to the trustee to have and to hold in trust nevertheless and for the following uses and purposes the following securities, to wit."

Then for this immediate question the three certificates covering The Irvine Company stock are described.

A Totaling 505 shares.

Q Totaling 505 shares of stock.

A Yes.

Q As I understood your testimony on direct examination, it was that this paragraph, this assignment paragraph, indicated to you that the trustor, Mr. Irvine, had given up the control over the corpus of the trust insofar as The Irvine Company certificates are concerned, is that right?

A Yes.

Q Does that also apply to Mr. Privett's examination of you with reference to the same transfer insofar as the validity of the trust is concerned or was concerned when you examined it?

A Yes. I believe my reply to Mr. Privett's question was that my view of it, more as a matter of law than a matter of fact, is that language when signed by

the trustor and this instrument delivered to The Foundation or people representing The Foundation would in itself suffice to give rise to a valid trust whether or not the stock certificates were physically, manually

Q Yes, but then what do you mean when you say the control of the corpus of the trust if it still remained in Mr. Irvine, the trustor? Then it raised a question as to the validity of the trust. What do you mean by that?

A Even though there might have been a valid delivery of the certificates themselves, whether manually or symbolically by this instrument, if in fact it was not intended to and did not create a trust but merely an agency or custodianship, then it would terminate at his death and fall into the residue of his estate.

Q Yes. That is what I understood you meant by both of your answers, but your answer to Mr. Privett in view particularly of your former answer that under the circumstances which I related in the question and which I understood you to answer the way I have just stated to you, that it had only been a paper trust involved, that there was a surrender of the control of the corpus of the trust by Mr. Irvine.

A Yes.

Q Is that right?

A Yes.

Q And then when I asked you the question with reference to the matter assuming that in 1941 Mr. Irvine had the possession and the control of certificates 33 for 132 shares and certificate 42 for 41 shares, that would mean what to you, as I understood you to say, it would mean that the trust was a paper trust, that he had the control of the corpus of the trust, is that right?

A Well, it would indicate to me that there never had been an effective transfer of ownership of those shares.

Q Yes. Well, that is what I understood, but I mean your later answer I thought required or indicated that there should be a clarification of your answer on direct examination as well as on cross examination by Mr. Privett.

Also, in one of the concluding questions that Mr. Privett propounded to you you referred to one of the documents, and I believe you have it in mind, in which you read a note which you said was in your handwriting to the effect, as I wrote it down, that title passed to trustee. Do you recall that?

A Yes.

Q And by that reference was it your assumption at that time that the actual title to the corpus—that would be the shares of stock that is described in the trust indenture—had passed to the trustee?

A That was my impression at the time.

BY MR. YOUNG:

Q That was your impression at that time, is that right?

A Right.

Q And if such title had not passed, then, what would your answer be as to the question of the validity of the trust?

A I would have considered it an invalid—invalid as a trust and that it belonged in the residue of the estate.

Q Yes. Well, that is the way I understood your testimony.

* * * * *

BY MR. PRIVETT:

Q But in response to some hypothetical question that Mr. Young put to you, he asked you what if the stock certificates had at one time, in whatever time he said, had at one time been back in the possession or back in the hands of Mr. Irvine, what difference would that have made to you?

A Well, it would have indicated that he retained not merely rights of income but rights over the corpus and would have weakened the trust theory and strengthened the custodianship theory, in my opinion.

* * * * *

REDIRECT EXAMINATION

BY MR. YOUNG:

Q I understood, Mr. O'Connor, that when I stated the hypothetical question about the 505 shares of Irvine stock having been in the possession and under the control, both, in the possession of and under the control of Mr. Irvine, that your answer to that question was then, if you had known that, you would have stated or held that the Indenture of Trust was only a paper trust and that it was invalid. Am I correct or incorrect?

A I don't so recall my testimony. I think my testimony was this, that that would be a strong factor for me to consider indicating that it was not a trust but a mere agency or something else.

Q And a paper trust, didn't you—

A Yes.

Q —use that word?

A Paper trust.

Q Just a paper trust.

A That here on this piece of paper it is given the appearance of a trust when it was never intended to be.

Q That's right. That's what I understood your answer was.

A That if those facts were so and shown to me, that that is the conclusion I quite possibly would have reached.

MR. YOUNG: Yes. That is all." (Tr. 2740, 2741-2743, incl.)

Testimony of Robert H. Gerdes.

"Q Your information about The Foundation and its property holdings were given to you by Mr. James Irvine?

A Well, by Mr. Irvine, and I also became acquainted with his son, Myford, and we became friends and we also talked about their affairs.

Q When did you first become a member of the board of directors of The Foundation and a member of The Foundation?

A I believe it was 1944.

Q Do you recall who you replaced on the board of directors?

A I think it was Mr. William Spaulding, who had, prior to that time, acted as his personal attorney on certain matters.

Q Had Mr. Spaulding also been with the P,G&E legal department for a period of time?

A Yes, he had. Prior to that he was associated with Mr. Chaffee Hall." (Tr. 1808-1809)

* * * * *

"Q Prior to the time that you went on the board of directors of The Foundation did you have any discussion with Mr. Irvine about that appointment?

A Yes. He asked me if I would be willing to serve as a director, a member and director, of The Irvine

Foundation. Prior to that time he told me that he wanted to become interested in the affairs, in his affairs, the affairs of The Irvine Company and The Foundation, and he asked me if I would be willing to serve, and at that same time he explained to me again what his general intents were with regard to the creation of The Foundation.

Q In substance, what did he tell you about what his intents were with respect to The Foundation?

A Well, he said that he thought he had been quite generous with members of his family and that he wanted to create a charitable trust for the benefit of worthy and needy people in the state and he felt that the state had been very good to him in that he had accumulated considerable property and wealth and he wanted to return some of this.

He also said that he thought it was important to have the control, or at least the majority of the members of The Foundation, which owned a majority of the stock of The Irvine Company, he wanted a majority of those directors to be men outside the family, who had had business experience, and he said that he had observed that other families that had accumulated considerable wealth frequently had extensive litigation and that it often tied up the operations of their properties; and so he thought it very important that they have outside individuals who could exercise their independent judgment and who would judge matters dispassionately as far as the family was concerned; and for that reason he said that he would like me to serve.

Q You then accepted an appointment as a member and director of The James Irvine Foundation?

A I did.

Q And you continued from that time forward until this as a member and director of that corporation?

A I have.

Q Did you prepare Mr. Irvine's will?

A Yes.

Q I show you a copy of the document that has been marked for identification as Defendants' Exhibit B, and I will ask you if you can identify this copy as the document to which reference has been made.

A Well, it looks like the will that was admitted to probate, without comparing every page.

Q What was the date of execution of the will, Mr. Gerdes?

A May 14, 1946.

Q Approximately how long was this will in the course of preparation between you and Mr. Irvine?

A I have no definite recollection, but I have—my impression is that it was a matter of a few weeks where he was giving me information and I would give him a draft and he would look at it and make suggestions.

Q In connection with the preparation of the will, did you discuss with Mr. Irvine his various property affairs as of that time?

A Yes, he discussed some of them with me.

Q Did he discuss specifically with you anything to do with stock of The Irvine Company?

A Yes. He said that he had given his son Myford—which of course I knew by that time—200 shares; that he had given, that 200 additional shares were given in trust for his son then deceased, James Irvine, which was under a trust; that he had given 50 shares, as I recall it, to Kate Wheeler, and 40 shares too, as I recall it, under a trust created for the benefit of his then wife." (Tr. 1810)

* * * * *

“Q. Did he tell you that one of the purposes he had in mind in organizing the Foundation was to avoid the payment of large estate back taxes after he died?

A He told me that if he died and still had owned the stock, he didn’t know that it would be valued for and it could result in the entire necessity of selling the entire property.

Q In order to pay his estate tax return—I mean the estate tax that was due?

A The estate and inheritance tax.

Q The inheritance tax, federal and of California, both. And he told you on that occasion that that was one of the prime reasons he set up The Foundation, isn’t that right?

A He said it was one of them. I don’t believe he used ‘prime,’ but that was one of them.” (Tr. 1941)

* * * * *

Testimony of N. Loyall McLaren.

“Q When did you discuss with Mr. Irvine the first time anything about a foundation?

A Sometime in the year 1935.

Q Where did that discussion take place?

A It took place in his office.

Q In San Francisco?

A In San Francisco.” (Tr. 268)

* * * * *

“Q Good. Tell us about it. You started out with one phase. Tell us that phase first, and what you said, what he said, and tell it to me.

A I have covered two aspects. One was the preservation of his life’s work as a monument, as he expressed it at that time. The second was the charitable

features, which would also perpetuate his memory through the foundation bearing his name.

The third was the protection of his estate from ruinous taxation which might result if at the time of his death the entire ranch were owned by The Irvine Company.

I remember talking to him about the case of the estate of Harry Teviss, who had been a large landholder in Kern County Land Company, and pointing out the basis of the taxation of the Kern County Land Company stock in the Teviss estate on the basis of market value of acreage based on small sales in the neighborhood, and compared with earning power, and pointed out how ruinous the result of that treatment had been to the Harry Teviss estate. I pointed out that if he divested himself of his Irvine Company stock that problem would be completely removed, and he mentioned in that connection that he had already made rather adequate provision for his heirs.

Those were some of the points discussed. We also discussed in a very limited way the type of charities that it might be worthwhile for him to consider as beneficiaries of funds from the foundation.

Those were I think the principal items. I may have overlooked one or two, but those were the principal ones.

Q Well, the question of the taxes was the important item, I take it then, isn't that right?

A The question of the taxes?

Q Yes.

A No.

Q Against the estate.

A No, that was not the most significant item.

Q Well, I understood you to refer to the Teviss estate and the large taxes that had to be paid there.

A I did, I did. That was one of the elements that I thought he ought to take into consideration.

Q Yes. Well, he was interested in that phase of your presentation, wasn't he?

A He was human, yes.

Q The taxes, I mean.

A Yes. He was human.

Q Yes.

A Yes.

Q And you were his tax advisor.

A Yes.

Q Is that right?

A Yes.

Q Did he also mention his family, his family had been well provided for?

A That's right.

Q Through other trusts and stockholdings in the ranch?

A I can't remember the details, except in general it summed up to the fact that the members of his immediate family were well provided for.

Q Well, did you know anything about that yourself personally?

A Let's see. 1936? I can't recall at that time how much I knew about the affairs of the family. I knew about his antenuptial agreement. By that time I knew, certainly knew, about the 200 shares of stock that he had given in trust to his son, I knew about the 200 shares that he had given outright to his other son, I knew of the trust that he had created for his granddaughter, I knew quite a bit about it, but I can't remember the details at present.

Q You I believe also were a trustee under a trust created for his granddaughter, Mrs. Wheeler?

A That came at a later date, yes.

Q Yes, and that involved 50 shares of Irvine Company stock?

A No, that involved some San Francisco real estate.

Q And some stock too?

A No, those were separate transactions.

Q I see. All right. Did he tell you on that occasion that he feared that his heirs might clash over the vast amounts of money and land which he would leave behind?

A Well, that is a—sounds like a press agent's blow-up. He did—

Q I am reading from your interview in the Los Angeles Times.

A Yes. Well, I was not quoted verbatim in the Los Angeles Times, I assure you.

Q Well, I am reading from the exhibits attached to your answer in this case, so—

A Yes, that was—let me make it clear, that there was never any prepared statement given to the Los Angeles Times. There was a personal interview, and I never saw the article before it was printed. That is not the words that I used to the reporter.

Q Did you see the article before it was attached as Exhibit C to your answer?

A I did. Certainly, I am familiar with the article.

Q The answer to the amended complaint in this case?

A I am familiar with the article.

Q Well, did he say anything to you about that matter at all?

A He expressed some concern that because of the differences that had developed among various branches of the family, that if steps were not taken to insure if possible the holding intact or intact as far as possible, of the major assets, major producing assets, of The Irvine Company, that the result might well be that the heirs would not continue to operate the ranch as a unit, and that in that way the results of his life's work would be destroyed sooner or later.

Q Well, did you have any discussion—

A Those were not his exact words. That in general is the impression I got from what he said." (Tr. 290-295, incl.)

In re Sutro's Estate, 155 Cal. 72; 102 P.920, the Court Stated.

"... This action was begun and brought to trial and judgment before the will was admitted to probate. The defendants as trustees set up the provisions of the will in opposition to the complaint. Judgment was rendered in favor of plaintiff, declaring the plaintiffs owners in fee of a two-thirds interest in the property, and that the trust attempted to be created by the will of Adolph Sutro was void, because, as the conclusions of law declare, the fund "was not intended wholly for charitable purposes, but was intended for purposes partly charitable and partly other than charitable, and that the purposes for which it was intended are vague and uncertain, and cannot be made certain." No appeal was ever taken from this judgment, and it has become final. It was entered on June 19, 1899.

* * * * *

“ . . . The fatal objection of the validity of the trust is that it authorizes the funds to be devoted to purposes other than charitable, and that it leaves the question whether it is to be devoted to charitable purposes, or to other uses not charitable, entirely in the discretion of the executors, or, in case of their default, in the discretion of the board of trustees. The Constitution declares that ‘No perpetuities shall be allowed except for eleemosynary purposes.’ Article 22, §9. The word ‘eleemosynary’ in this passage is synonymous with ‘charitable,’ as the latter word is used and understood in treatises and decisions upon the subject of trusts.

The rule upon this subject was stated in the decision of this court in *Estate of Hinckley*, 58 Cal. 509, in these words: ‘Where a bequest is made for charitable purposes, and also for purposes of an indefinite character, which are not charitable, the whole bequest will be void. If, for instance, a bequest is made for such charitable or other purposes as the trustees should think fit, the whole bequest will be void for uncertainty’—citing *Tudor on Charitable Trusts*, 223. This statement of the rule is well established by a long line of cases on the subject. In *Mason v. Perry*, 22 R. I. 475, 494, 48 Atl. 671, 678, the court says: ‘It is well settled that, in order to create a valid charitable trust in perpetuity, the language employed must require the fund to be expended for charitable purposes only, and it must not be left in the discretion of the trustees to spend the money for a charitable or noncharitable purpose. In other words, the devotion of the fund to charity must be clear and certain.’ In the case of *In re Shattuck’s Will*, 193 N. Y. 446, 86 N. E. 455, decided by the New York Court of Appeals, the provision was that the trust funds

were to be 'paid over to religious, educational, or eleemosynary institutions' as the trustees should deem advisable. The court says: 'The word "educational" does not necessarily describe a public or charitable institution. * * * An 'institution' is an established or organized society or corporation. It may be private in its character, designed for profit to those composing the organization, or public and charitable in its purposes. An institution is a mere organism for the accomplishment of an object, and the existence of such organism cannot, in the nature of things, make such object definite. The use of the word 'institution' does not point to a public, as distinguished from a private, organization, and there is nothing whatever in the will, except in the words 'religious,' 'educational,' and 'eleemosynary,' that points in the slightest degree to a charitable use. And after holding that under the will the trustee could devote the proceeds of the trust fund to purposes which would be in whole or in part private and individual, and not public and charitable, the court says: 'The possible devotion of the income of said trust in whole or in part to private use necessarily affects the entire gift, and requires that the same shall be held invalid.' In *Chamberlain v. Stearns*, 111 Mass. 268, Gray, J., quotes from the opinion of Sir William Grant in *James v. Allen*, 3 Meriv. 17, the following in regard to a trust of this character: 'If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the court to execute.' In *Kendall v. Granger*, 5 Beav. 300, the court say: 'It is not a question whether the trustees may apply it [the fund] to a charitable purpose, but whether, by the words of the will, they are bound to do so. The decisions go

to this further extent that they must have no option between a charitable and any other purpose.' Quotations could be multiplied indefinitely annuoncing this doctrine. It is thus summarized in 2 Perry on Trusts, §711: 'There are other cases where legacies are given in trust for purposes that are clearly charitable, but these purposes are joined with words that authorize the trustees to expend the fund for general purposes which are not charitable. If the fund is not apportioned by the donor, the trustees may expend the whole for one purpose or another which is not charitable, and at the same time execute the exact power given them under the will. In such cases the courts cannot establish and administer the trust as charitable.' "

In re Kline's Estate, 118 C.A.514; 32 P.2d 677, the Court Stated.

Respondent makes the suggestion that, since legacies and devises for charitable purposes "are the favorites of the courts, * * * the language should be liberally construed so as to create a valid trust if possible." Even though the fact be conceded that when, in the course of the operation of their proper functions in cases of this kind, in some scattered instances the courts may seem to have strained legal principles in decreeing the creation of charitable trusts, it cannot be accepted as a correct statement of a legal or equitable principle to say that in such situation the courts, as an institution, are required to show partiality in favor of litigants who would be benefited by such declaration. On reflection, it should be apparent that the courts can have no fixed policy which will admit of the operation of a principle by which one party to litigation will be favored to

the detriment of the other party therein. Manifestly, even-handed justice cannot be administered on the basis of partisanship, expressed or indicated, either of the parties to the litigation. Nor may the subject-matter in controversy in any manner affect the scales of justice. The business of the courts is to administer justice as nearly as may be in accordance with fixed rules of law and procedure, aided wherever and whenever proper and necessary by established and governing principles which relate to equity jurisprudence. Any intentional departure from such a course, no matter how worthy the objective, must result in reproach to the surest foundational support of our government. Hence, in the instant inquiry, however obvious it may be that what the testator himself had in mind was to dispose of certain of his property in a benevolent manner, even though it may have been "for the purpose of aiding and for the betterment of crippled children," his good intentions in the matter cannot be carried into effect by the creation of a charitable trust therein in the face of his plain language which permits his trustee to devote his estate, or some portion thereof, to purposes that are legally non-charitable. It may be that the testator probably thought that what he had in mind was to create that which in the law constituted a charitable trust; but the estate of the testator is bound by the specific and express directions contained in the testator's will, rather than by inconsistent references or "side remarks" interspersed therein. *Taylor v. Keep*, 2 Ill.App. 381; *In re Sutro*, 155 Cal. 730, 102 P. 920; *In re Walkerly*, 108 Cal. 627, 41 P. 772, 49 Am. St. Rep. 97; *In re Vance*, 118 Cal. App. 163, 4 P.(2d) 977.

In *Estate of Doane*, 190 Cal. 412, 415, 213 P. 53, 54, it is said: "The decedent having made an invalid provision in clear, unequivocal language, the courts are without power to alter that language to express what may have been in the testator's mind but was not attempted to be expressed by him, however beneficent such unexpressed intent may have been. 'It may be said of all wills, that the testator's intent is to make a valid disposition of his property. * * * But a court is not therefore authorized to modify or vary the plain language of the testator, and thus create a new and valid will for him, even if it were certain that the testator would have adopted the interpretation of the court, had he known his own attempt was invalid.' *Estate of Walkerly*, supra, 108 Cal. 627, 659, 41 P. 772, 780, 49 Am. St. Rep. 97."

And again, in the *Matter of Frasch's Will*, 245 N. Y. 174, 156 N. E. 656, 658, where the bequest was carefully, "ear-marked," among other things, the court said: "So, too, a trust which may include social, educational or moral benefit, confined to members of a corporation and in which the general public has no direct participation, has been declared a trust for a private use. *Attorney General v. Hewer*, 2 Vern. 387; *Carne v. Long*, 2 De Gex. F. & J. 75; *Miley v. Attorney General* (1918) 1 Irish Rep. 455. In such cases since the use is not charitable even in a broad sense, an intent or purpose on the part of the creator of the trust to confer an indirect benefit upon the public does not change the character of the trust. Not even if the designated use might tend to create the contemplated public benefit would the rule be different. 'There is no authority for holding a charitable tendency to be a charitable use; in

other words, that a gift to a person for his own benefit, whereby consequential charity may arise, is not a charitable use.' ”

As executed, the effect of the paragraph of the will to which attention hereinbefore has been directed is that the trustee therein named is permitted to disburse a portion of the income of the trust property to uses that in legal contemplation either are or may be noncharitable. Especially as applied to a noncharitable corporation, that such a provision in a will defeats its intended purpose is attested by so many authorities that to cite them would amount to a superfluity. However, as to general governing principles, see the cases hereinbefore cited; also *Estate of Dol*, 182 Cal. 159, 187 P. 428, which relates particularly to an attempt to create a charitable trust in favor of a noncharitable corporation.

From the foregoing it may be deduced that, in the opinion of this court, no legal trust was created.

In re Vance's Estate, 118 C.A.162; 4 P.2d 977, the Court Stated.

“Tested by the standard required for a private trust, the attempt of the testatrix fails to establish a trust, because of the uncertainty as to beneficiaries. *Barker v. Hurley* (1901) 132 Cal. 21, 63 P. 1071, 64 p. 480. Appellants do not question this conclusion, but rest their claim to the balance of the estate on the theory that a charitable trust was created. In such a trust, the persons constituting the beneficiaries need not be certain—indeed, should not be. *Estate of Hinckley* (1881) 58 Cal. 457; *Collier v. Lindley* (1928) 203 Cal. 641, 652, 266 P. 526. But, in order that a trust may be valid as a charitable trust, its objects must be

limited to those of a charitable nature. Estate of Sutro (1909) 155 Cal. 727, 102 P. 920, 922. Two short quotations in the Sutro Case express its thought. The first is from Estate of Hinckley, *supra*: 'Where a bequest is made for charitable purposes, and also for purposes of an indefinite character, which are not charitable, the whole bequest will be void.' These words from the opinion in Kendall v. Graner, 5 Beav. 300, are also given: 'It is not a question whether the trustees may apply it (the fund) to a charitable purpose, but whether, by the words of the will, they are bound to do so. The decisions go to this further extent that they must have no option between a charitable and any other purpose.' "

In re Peabody's Estate, 21 C.A.2d 690; 70 P.2d 249, the Court Stated.

Appellants maintain that (1) paragraph 7 is valid because it can be construed to create a lawful private trust, and, (2) that it is valid because it can be construed to create a charitable trust. Each of these arguments refutes the other, because, generally, if the provisions of a will which attempt to create a trust are so uncertain that they may be construed to create either a private or a charitable trust it has been usually held that the purported trust failed because of uncertainty in the instrument which attempted to create it. In re Estate of Hinckley, 58 Cal. 457, at page 509, it is said: " 'Where a bequest is made for charitable purposes and also for purposes of an indefinite character, which are not charitable, the whole bequest will be void. If, for instance, a bequest is made for such charitable, or other purposes, as the trustee should think fit, the whole bequest will be void for uncertainty.' (Tudor on Charitable

Trusts, 223.) It was said by counsel (*arguendo*) ‘the principle of all the cases is, that the portion of the trust that might otherwise be construed as charitable, can not be sustained, because the trustees have an election apply the fund to purposes not technically charitable.’ ”

That the will fails to create a valid private trust is apparent from a reading of the trust provision. It violates the rule against perpetuities. Sections 715, 772, Civ. Code. In *re Estate of Hinckley*, *supra*. The beneficiary under the trust or the class from which it may be selected by the trustee, is not made certain in the instrument attempting to create it. Section 2221, Civ. Code. In *Re Estate of Ralston*, 1 Cal. (2) 724, 37 P. (2d) 76, 77, 96 A.L.R. 953, it is said: “It is essential to the validity of a trust, whether express or precatory, that the language employed definitely indicate an intention to create a trust, that the subject-matter thereof be certain, and that the object or persons intended to have the benefit thereof be certain. The authorities are legion to this effect. The ‘trust’ here involved is defective and invalid because of its complete failure to indicate either the object or the persons to benefit thereby.”

If, however, the will created a valid charitable trust, an uncertainty as to the beneficiary is no ground for asserting its invalidity where, as here, the power is given to the trustee to nominate the recipient of the charity. In *re Estate of Bartlett*, 122 Cal.App. 375, 10 P.(2d) 126; In *re Estate of Bailey* (Cal.App.) 65 P.(2) 102; In *re Estate of Hinckley*, *supra*.

Under paragraph 7 of the will it would seem clear that the trustee could nominate as the beneficiary

of the trust "an institution for old people" that was either charitable in its purposes or was organized for profit. The will contains no limitation on the power of selection by the trustee that would require him to select a charitable institution as beneficiary.

The use of the word "institution" by the testatrix is of no particular significance here. In *re Estate of Sutto*, 155 Cal. 727, 102 P. 920, 922, the Supreme Court in quoting from *In re Shattuck's Will*, 193 N.Y. 446, 86 N.E. 455, and in commenting on that case, said: "An 'institution' is an established or organized society or corporation. It may be private in its character, designed for profit to those composing the organization, or public and charitable in its purposes. An institution is a mere organism for the accomplishment of an object, and the existence of such organism cannot, in the nature of things, make such object definite. The use of the word 'institution' does not point to a public, as distinguished from a private, organization, and there is nothing whatever in the will, except in the words 'religious,' 'educational,' and 'eleemosynary,' that points in the slightest degree to a charitable use.' And after holding that under the will the trustee could devote the proceeds of the trust fund to purposes which would be in whole or in part private and individual, and not public and charitable, the court says: 'The possible devotion of the income of said trust in whole or in part to private use necessarily affects the entire gift, and requires that the same be held invalid.'"

It is well known that there are many charitable institutions that are organized and exist solely for the purpose of caring for needy old people. It is equally well known that there are other such institutions or-

ganized and conducted for private profit. Both classes may be composed of deserving institutions in that they provide repose and care for the aged. The deceased used no appropriate language in her will to designate either of these classes. We cannot rewrite her will. We must construe it as she wrote it. The conclusion that the testatrix had in mind either a charitable institution or one organized for private profit would be based on conjecture and not on anything written in the will. In order to avoid intestacy, either partial or complete, we are not permitted to place on the will any construction not expressed in it and which is based on supposition as to the intention of the testatrix in the disposition of her estate. In *re Estate of Hoytema*, 180 Cal. 430, 181 P. 645.

A similar situation was before the court in *Re Estate of Sutro*, *supra*. Under the trust attempted to be created in the will there under consideration, the beneficiaries of the trust could be either charitable or other than charitable. The Supreme Court there concluded that: "Without violating the directions of the will the entire fund could be devoted to institutions of learning and science carried on for private gain, of which there are many, or to the encouragement of abstract scientific discoveries not tending to benefit mankind, or to reward inventions calculated to profit the inventor alone, or those to whom he should transfer his secret or patent. The trustees could apply a part to each of the different objects, or they could apply the whole of it to one of them to the exclusion of any other. These objects not being exclusively or necessarily charitable, it follows, under the rule stated, that the entire trust was invalid."

We consider this holding conclusive here. The case of *In re Estate of Kline*, 138 Cal. App. 514, 32 P.(2d) 677, is to the same effect.

In *Goetz v. Old Nat. Bk. of Martinsburg*, 84 S.E.2d 759, the Court Stated.

“Going further into the question of charitable trusts other than religious trusts, clearly it was the intention of the testatrix to create a charitable trust in part. But the language used in attempting to do so is so general and indefinite that the executors and trustees may use part of the property in establishing a charitable trust. Likewise, such trustees, under the wide and uncontrolled discretion accorded them, may create a private trust. Therefore, the trust created by the testatrix would be ‘mixed’. In *re Durbrow’s Estate*, 245 N.Y. 469, 157 N.E. 747. The purpose of a trust and duties of a trustee must be clearly defined. *Massanetta Springs, etc., Encampment v. Keezell*, 161 Va. 532, 171 S.E. 511.”

* * * * *

“In this state of the record, we think that a trust for profit as well as a charitable trust is created by the fourth clause of the will. 51 *Harvard Law Review*, 562. Such mixed trust cannot be sustained. 2A *Bogert on Trusts*, pages 81, 82; 2 *Restatement of the Law, Trusts*, § 376;”

* * * * *

“The trust is for mixed purposes, and though the will of the testatrix be considered as partially providing for a charitable trust, there is no method of apportionment as between the charitable purposes and the scientific and other trust for profitable purposes mentioned

by testatrix. *Tilden v. Green*, 130 N.Y. 29, 28 N.E. 880, 14 L.R.A. 33; *Wheelock v. American Tract Co.*, 109 Mich. 141, 66 N.W. 955, 63 Am.St.Rep. 578; *Mitchell v. Reeves*, 123 Conn. 549, 196 A. 785, 115 A.L.R. 1114.”

* * * * *

The rule against perpetuities has been defined as follows: “The rule against perpetuities is not a rule of construction but is an arbitrary, absolute and fundamental canon to prevent indefinite control by a grantor or testator over the devolution of property. * * * requires that ‘every executory limitation, in order to be valid, shall be so limited that it must necessarily vest, if at all, within a life or lives in being, ten months and twenty-one years thereafter, the period of gestation being allowed only in those cases in which it is a factor.’” Pts. 4 and 5, syllabus, *Brookover v. Grimm*, supra [118 W.Va. 227, 190 S.E. 697]; *Whelan v. Reilly*, 3 W.Va. 597; *Smith v. United States Nat. Bank of Denver*, 120 Colo. 167, 207 P.2d 1194.

The foregoing statement of the rule against perpetuities clearly applies to human beings. In the instant case, we are dealing with two executors who are artificial beings and also unidentifiable beneficiaries or ultimate takers of the property. In that situation, it may be that the element of life or lives in being and the period of gestation may not be factors in applying the rule. Nevertheless, we apply the rule against perpetuities as stated in *Brookover v. Grimm*, supra, giving consideration to the element of life or lives in being and the period of gestation. As so applied, the rule would prevent the vesting of the property in the ultimate beneficiaries for the reason that the trustees have an un-

controlled discretion and no time is fixed in the will for them to finally dispose of the property bequeathed by the testatrix.

The rule against perpetuities does not apply to charitable uses. *Pace v. Dukes*, 205 Ga. 835, 55 S.E.2d 367; *Hulet v. Crawfordsville Trust Co.*, 117 Ind.App. 125, 69 N.E.2d 823; *Miller v. Flowers*, 158 Fla. 51, 27 So.2d 667; *In re Wright's Estate*, 284 Pa. 334, 131 A. 188.

The trust here considered, having in mind the unlimited discretion of the trustees, may possibly be converted into a charitable as well as a noncharitable trust. The execution of such trust is barred by the rule against perpetuities. *In re Kline's Estate*, 138 Cal.App. 514, 32 P.2d 677.

**In *Grigson v. Harding*, 144 A.R.2d 870, the
Court Stated.**

“The discretion of the trustees must, in any event, be limited to a distribution for charitable purposes. If, in his discretion, it may include noncharitable purposes, the gift is not charitable.” Page on Wills, *supra*, page 593. The beneficiaries of a private trust must be definitely ascertained at the time of the creation of the trust or definitely ascertainable within the period of the rule against perpetuities. “* * * it has been held in England and quite generally in the United States that where property is left in trust for purposes which are not limited to charity, although they may be broad enough to include charity, the intended trust fails altogether.” Scott on Trusts, Vol IV, Page 2820, Sec. 398.2.

In *Green v. Allen*, 132 Me. 256. 170 A. 504, 505, an estate was left to four named persons “to be distributed

by them in accordance with their wishes and desires. Inasmuch as (A—one of the four) is familiar with my wishes to a considerable extent, his suggestions may be helpful in the distribution.” Because of uncertainty and indefiniteness, the property passed by resulting trust.

“The purposes for which such bequest can be used must be charitable only. If the intention of the testator was that the gift could be used for other than charitable uses, it is fatal to the validity of the bequest. If a part may be so otherwise used, all of it may be.” *Bates v. Schillinger*, 128 Me. 14, 20, 145 A. 395, 398.

“A trust which by its terms may be applied to objects which are not charitable, in the legal sense, and to persons not defined by name or by class, is too indefinite to be carried out.” *Murdock v. Bridges*, 91 Me. 124, 133, 39 A. 475, 478.

In *Olliffe v. Wells*, 130 Mass. 221, the gift was to the trustee “to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him.” Here again the trust failed for indefiniteness and uncertainty.

In *Smith v. Heyward*, 115 S.C. 145, 105 S.E. 275, provision was made for keeping up the homestead, house and garden where was located also the family tomb. The court pointed out that there was no charitable purpose because there was no public benefit. It was held that the trust must fail as being too vague and indefinite and as violative of the rule against perpetuities.

The provisions of the will, thus interpreted, fall into the category illustrated by the Restatement of

the Law of Trusts, *supra*, page 1291, Sec. 417(b): "1. A bequeaths \$10,000 to B in trust to dispose of it to such objects of benevolence and liberality, charitable or otherwise, as B in his discretion shall most approve of. B holds the money upon a resulting trust for the next of kin of A * * *." The controlling rule of law is set forth by the Restatement at page 1200, Sec. 398, Comment on Subsection (1) in these words: "If property is transferred to a person upon an intended trust for indefinite or general purposes, which include *but are not limited to* charitable purposes, and there is no definite or definitely ascertainable beneficiary designated, the intended trust fails." (Emphasis supplied.) In *re Peabody's Estate*, 1937, 21 Cal.App.2d 690, 70 P.2d 249, at page 250, the court said: "The will contains no limitation on the power of selection by the trustee that would require him to select a charitable institution as beneficiary. * * * We cannot rewrite her will. We must construe it as she wrote it. The conclusion that the testatrix had in mind either a charitable institution or one organized for private profit would be based on conjecture and not on anything written in the will. In order to avoid intestacy, either partial or complete, we are not permitted to place on the will any construction not expressed in it and which is based on supposition as to the intention of the testatrix in the disposition of her estate." Cases decided upon the same principles of law are *Matter of Shattuck's Will*, 1908, 193 N.Y. 446, 86 N.E. 455; *Estate of Sutro*, 1909, 155 Cal. 727, 102 P. 920; *Nichols v. Allen*, 1881, 130 Mass. 211; *Wilcox v Attorney General*, 1910, 207 Mass. 198, 93 N.E. 599. The applicable law inexorably compels us to declare a resulting trust to the next of kin.' "

Scott on Trusts, Sec. 398.2, p. 3079.

(4) *Whole disposition fails.* On the other hand, it has been held in many cases that where property is bequeathed in trust for charitable purposes and other purposes for which a trust cannot be validly created, the trust fails altogether. In these cases the court has found it to be impossible or impracticable or contrary to the intention of the testator to uphold the trust, either in whole or in part, as a charitable trust.

As we have seen in the preceding section, it has been held in England and quite generally in the United States that where property is left in trust for purposes which are not limited to charity, although they may be broad enough to include charity, the intended trust fails altogether. In a few of these cases it has been argued that a pro rata division should be made between charitable and noncharitable objects, and that the trust should be upheld in part. The courts have held, however, that the method of making a pro rata division of the property among the valid and invalid objects is not applicable where the testator has not enumerated several objects but has merely grouped together in general language objects which are charitable and objects which are not charitable. Where the testator has used several adjectives or nouns, of which some connote charity and others do not, the court will not direct a division of the property into as many shares as there are adjectives or nouns. The question of such an apportionment was raised in *Morice v. Bishop of Durham*. In that case the testatrix left the residue of her estate to such objects of "benevolence and liberality" as the legatee should most approve of. The Attorney-General con-

tended that although the word "liberality" did not connote charity, the word "benevolence" did, and that the court should divide the fund into two equal parts and uphold the trust as to one half of the estate. Lord Eldon held, however, that even assuming that the word "benevolence" connoted charity, no apportionment should be made. In a later English case a testator bequeathed one fifth of his residuary estate in trust "for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select in such shares and proportions as they think proper." The court held that the trust failed, since "patriotic" purposes are not necessarily charitable. Lord Sterndale, M.R., said: "Then the third and last resort was that, at any rate, assuming patriotic purposes and objects to be outside the definition of charity, and therefore bad in law, the fund can be divided between patriotic objects which are not charitable, and patriotic objects which are charitable. I do not see how that can be done. There is no distribution at all between the different objects. The trustees are to apply the fund either to one or to the other, or to one and the other in quite undefined proportions, and it is therefore open to them, on the wording of the will, to apply the whole of the fund to purposes which are not charitable, and have nothing left for charity, and, in those circumstances, it seems to me an apportionment such as is suggested, whether in equal or in other proportions, is impossible."

In Lawson v. Lowengart, 59 Cal. Rptr. 186, the Court Stated.

“The actual or symbolic delivery of the securities was essential to complete the inter vivos trust. A delivery by instrument must have the intended effect of divesting the donor of all present control and vesting the trustees with an equitable present right to reduce the fund into possession (*Beebe v. Coffin*, 153 Cal. 174, 177-178, 94 P. 766). A delivery may be symbolic, such as delivery of a written instrument, without physical delivery of the securities themselves, so long as the instrument is one upon which delivery of the trust corpus might be compelled (*Lefrooth v. Prentice*, 202 Cal. 215, 259 P. 947; *Edwards v. Guaranty Trust etc. Bank*, 7 Cal.App. 86, 89, 190 P. 57).

The mere signing of the instrument by Dr. Maxwell did not constitute delivery nor create a presumption thereof (*Boyd v. Slayback*, 63 Cal. 493; *Miller v. Jansen*, *supra*). As to Dr. Maxwell's concern with the execution and completion of the inter vivos trust at the time of signing, the record is in sharp conflict, as indicated above. The court could reasonably infer that she had no intention that the trust become effective unless and until the Los Altos home and the Lawson securities were included. There is no testimony that she ever directed Mr. Cotton to deliver the instrument to any of the trustees nor that she gave him any irrevocable directions to so deliver it. As Mr. Cotton was then her attorney, the court could justifiably find, under the circumstances of this case, that his possession constituted her possession and that she retained control. Possession by the grantor has been held to raise a presumption of non-delivery (*Tweedale v. Barnett*, 172 Cal. 271, 156 P.

483; *Lample v. McDougall*, 103 Cal.App. 799, 285 P. 328).

The fact that Dr. Maxwell handed the instrument to Mr. Cotton after signing it, did not of itself constitute a delivery to him or authorize him to deliver the instrument to the trustees. The mere handing of an instrument to a third party does not comprise delivery or authorize that person to deliver the same to the assignee unless there are express and definite instructions to that effect and unless such directions are irrevocable and the instrument is placed beyond the assignor's power of control or recall (*Jeannerette v. Taylor*, 2 Cal.App. 2d 568 at p. 570, 38 P.2d 831; *Estate of McConkey*, 33 Cal.App.2d 554 at pp. 560-561, 92 P. 2d 456; *Bank of America v. Frost*, 205 Cal.App.2d 614, 23 Cal.Rptr. 441; *Kunde v. Kunde*, 122 Cal.App.2d 624, 266 P.2d 608).

Here, while the instrument was in fact given to the trustees by Mr. Cotton, there was no expressed intention by Dr. Maxwell that the instrument was to be so delivered. It was the duty of the trial court to weigh the conflicting evidence concerning Mr. Cotton's authority and the inferences to be drawn from the facts of his employment (*Gagnon Co., Inc. v. Nevada Desert Inn*, 45 Cal.2d 448, 459, 289 P.2d 466; *Sullivan v. Dunne*, 198 Cal. 183, 244 P. 343). As there was ample evidence that he was not authorized to deliver the agreement to the trustees, the fact that he did so and caused them to sign it is of no legal significance (*Rothney v. Rothney*, 41 Cal.App.2d 566, 570, 107 P.2d 294).

If Dr. Maxwell had no intention of divesting herself of control at the time, the handing of the instrument to Mr. Cotton and his manumission of

the instrument to the trustees would not constitute a constructive or symbolic delivery sufficient to establish the trust. The delivery or absence of delivery to the trustees by way of the trust agreement was a question of fact to be determined by the trial court (*Blackburn v. Drake*, 211 Cal.App.2d 806, 27 Cal.Rptr. 651). We have concluded upon a consideration of the entire record that the court's finding that Dr. Maxwell never intended or effected delivery was sufficiently supported by the evidence (cf. *Pollard v. Pollard*, 166 Cal.App.2d 698 at pp. 702-703, 333 P.2d 356).

As our conclusion as to the sufficiency of the evidence to sustain the judgment on either of the first two issues raised disposes of the appeal, we need not discuss the parties' contentions concerning the prerequisites for the transfer of the trust corpus."

In *Obranovich v. Stiller*, 220 C.A.2d 205; 34 Cal. Rptr. 923, the Court Stated.

The well settled rule is succinctly stated by Mr. Justice Peters in *Henneberry v. Henneberry* (1958) 164 Cal.App.2d 125, 129, 330 P.2d 250, 252: "In addition to physical delivery, and an acceptance by the grantee, to constitute a valid delivery there must exist a mutual intention on the part of the parties, and particularly on the part of the grantor, to pass title to the property immediately. In other words, to be a valid delivery, the instrument must be meant by the grantor to be presently operative as a deed, that is, there must be the intent on the part of the grantor to divest himself presently of the title. Even if the document is manually delivered, but the evidence shows that the parties or the grantor intended the document to become operative

only upon death, the document is testamentary in character and void as a deed.

‘In determining this fundamental issue of intent, various presumptions and inferences arise in favor of the validity of the delivery because of due execution, manual transfer, possession of the document by the grantee, its acknowledgment and recordation. But these presumptions and inferences are all rebuttable. Declarations and acts of the grantor before and after the alleged delivery, and of the grantee afterwards, are admissible on this issue. Fundamentally, the question of intent is one of fact to be determined by the trier of the facts on all the evidence.’

As we said in *Blackburn v. Drake* (1963) 211 Cal.App. 2d 806, 811, 27 Cal. Rptr. 651, 654, ‘Delivery or absence of delivery is a question of fact to be determined by the trial court. * * * A deed delivered with the intent that it shall take effect only on the death of the grantor is an attempted testamentary disposition and therefore void.’

In *Blackburn v. Drake*, supra, 211 Cal.App.2d pages 812-813, 27 Cal.Rptr. pages 655-656, Mr. Justice Molinari pointed out that there has been some confusion in the authorities in this state as to whether the possession of a deed raises a presumption or inference of delivery due to a difference in interpretation of section 1055, Civil Code, which provides that ‘A grant duly executed is presumed to have been delivered at its date.’ He then refers to the cases holding each way respectively, and concludes that the question has been settled by the decision in *Miller v. Jansen*, 21 Cal.2d 473, 477, 132 P.2d 801, which holds that possession of a deed by the grantee raises an inference of delivery. But, says

he, 'Whatever the niceties of the law be as between a presumption and an inference insofar as the kind or amount of evidence necessary to dispel such presumption or inference, it is settled law that the inference of delivery are rebuttable and in the face of contrary evidence become considerations of fact for the trial court or jury to determine. [Citations.] * * * Whether there was a delivery involved a disputed question of fact which was the function of the trial judge to determine from the facts and circumstances in evidence, it being within his province to pass upon the credibility of the witnesses, to weigh their testimony, and draw therefrom his inferences.' (211 Cal.App.2d p. 813, 27 Cal.Rptr. p. 655) Defendant contends that where the word 'delivery' is used in the authorities it means the manual transmission of the deed, whereas the 'delivery' the authorities are talking about and the one with which we are concerned means delivery with intent to vest in the grantee immediate title to the property described in the deed. (See the quotation hereinbefore set forth from Henneberry, *supra*, 164 Cal.App.2d page 129, 330 P.2d page 252.)

* * * * *

"Because of the inference arising from possession of the deed by the grantee, a *prima facie* case of a valid delivery was established by the evidence in this case that Mrs. Palm executed the deed and handed it to defendant, and that the deed remained in defendant's possession thereafter. Thus, we are confronted with the question whether there are circumstances or other contradicting evidence which overcomes the inference of delivery and any evidence supporting delivery. . . .

In contradiction of this evidence and supporting the court's finding that the transfer of title was not intended to occur until Mrs. Palm's death is the following: Defendant did not collect any of the rents from the property, nor did he pay any taxes on the property. Mrs. Palm collected all the rents, paid the taxes and arranged and paid for the insurance. All that he did with respect to the property was to do some repair work when Mrs. Palm requested him to do so. Mrs. Palm continued to live in an apartment on the premises. Defendant did not file a gift tax return in 1952 after receiving the deed. Mrs. Palm never accounted to defendant for the rents. He did not declare any revenue from the property or expenses or depreciation on the property in his income tax returns. Defendant testified that he knew that his sister was reporting in her income tax return the rentals received by her from the property. In a letter written to Mr. and Mrs. Michael, after the date of the delivery of the deed, Mrs. Palm stated that the property 'will be' defendant's, which statement is not consistent with her having already passed title to defendant.

'The retaining of possession of the property by plaintiff and the exercising of acts of proprietorship over it by her are evidence of ownership and a lack of delivery of the deed.' (Labadie v. Labadie (1943) 57 Cal.App.2d 456, 464, 134 P.2d 858, 861.) 'Exercise of dominion over property after the execution of a deed is incompatible with delivery and inconsistent with divestiture of title. [Citations.] While such dominion does not negate delivery as a matter of law, its incompatibility with delivery renders it a circumstance to be considered by the trier of fact on the question of de-

livery or nondelivery, particularly when coupled, as here, with the circumstance of nonexercise of dominion by the grantees.' (Blackburn, *supra*, 211 Cal.App.2d p. 818, 27 Cal.Rptr. p. 658.)

It seems strange that his sister would hand him a deed to transfer immediate title without discussion as to what her relationship to the property was to be thereafter. Defendant testified that no witnesses were present when the deed was given him. His failure to disclose what was said, coupled with his not recording the deed until after her death, plus her complete control and management of the property, strongly indicate that it was intended not only by Mrs. Palm, but by defendant as well (although it is Mrs. Palm's intent with which we are primarily concerned (Blackburn, *supra*, 211 Cal.App.2d p. 811, 27 Cal.Rptr. p. 654)) that the deed was only to have a testamentary effect."

In Blackburn v. Drake, et al., 211 C.A.2d 806; 27 Cal.Rptr. 651, the Court Stated.

"'Delivery or absence of delivery is a question of fact to be determined by the trial court (Concencia v. Nelson, 187 Cal.App.2d 300, 302, 9 Cal. Rptr. 759; Chaffee v. Sorensen, 107 Cal.App.2d 284, 288, 236 P.2d 851.) Intent to pass title is an essential element of delivery and the question of intent is a question of fact to be determined by the trial court or jury upon all the circumstances surrounding the transaction. (Jones v. Jones, 183 Cal.App.2d 468, 472, 6 Cal.Rptr. 819; Williams v. Kidd, 170 Cal. 631, 638, 151 P. 1; Priest v. Bell, 123 Cal.App.2d 528, 531, 267 P.2d 49; Donahue v. Sweeney, 171 Cal. 388, 153 P. 708.) The important intention is that of the grantor and not that

of the grantee. (Huth v. Katz, 30 Cal.2d 605, 608, 184 P.2d 521; 15 Cal.Jur.2d § 84, p. 481.) A deed delivered with the intent that it shall take effect only on the death of the grantor is an attempted testamentary disposition and therefore void. (Williams v. Kidd, supra, 170 Cal. 631, 644, 151 P. 1.) The applicable rule is well-stated in Henneberry v. Henneberry, 164 Cal. App.2d 125, 330 P.2d 250: "In addition to physical delivery, and an acceptance by the grantee, to constitute a valid delivery there must exist a mutual intention on the part of the parties, and particularly on the part of the grantor, to pass title to the property immediately. In other words, to be a valid delivery, the instrument must be meant by the grantor to be presently operative as a deed, that is, there must be the intent on the part of the grantor to divest himself presently of the title. Even if the document is manually delivered, but the evidence shows that the parties or the grantor intended the document to become operative only upon death, the document is testamentary in character and void as a deed." (p. 129, 330 P.2d p. 252.)

* * * * *

"As to the fact of delivery, the appellants contend that there is no evidence dispelling the presumption claimed by them. The precise question at hand is whether there are circumstances or other contradicting evidence which dispel the inference of delivery. The respondent is not concerned with the effect of the inference of delivery, or the claimed presumption of delivery, but is content to rest his argument on the assertion that the evidence in support of the trial court's findings was overwhelming and convincing, and that any one of eight items of evidence alluded to would sup-

port the court's finding of nondelivery. We do not agree with the respondent that the evidence adduced by the respondent in sustaining his burden of proof as plaintiff, and its effect as evidence dispelling the inference of delivery, was overwhelming; nor are we in accord that each of the items of claimed evidence supports the lower court's findings. Upon a consideration of the entire record we are satisfied, however, that there is sufficient evidence to sustain the trial court's finding of nondelivery, and we shall, hereafter allude to the evidentiary items, the cumulative effect of which establishes such sufficiency. Whether there was a delivery involved a disputed question of fact which was the function of the trial judge to determine from the facts and circumstances in evidence, it being within his province to pass upon the credibility of the witnesses, to weigh their testimony, and draw therefrom his inferences.

From the evidence before us, the trial court could find that Mrs. Blackburn did not intend that the deed should be presently operative. This inference could be drawn from Mrs. Giesser's testimony that her mother "*just kidding*ly said, 'There it is. You can put me out now, if you want to' * * *." (Emphasis added.) Appellants' assertion that Mrs. Blackburn was not "kidding" when she told her daughter to record the deed creates, at best, a conflict in the evidence. While it is true that recordation is not essential to the validity of a deed and that the failure to record in and of itself does not vitiate delivery or the intent to make a present transfer (Bell v. Bonavia, *supra*, 167 Cal.App.2d 275, 280, 334 P.2d 196; Stewart v. Silva, *supra*, 192 Cal. 405, 410, 221 P. 191), the failure to record until after the

death of the grantor is a circumstance for the court to consider with the other circumstances surrounding the transaction in ascertaining whether the grantor intended the deed to be presently operative. (Estate of Galvin, *supra*, 114 Cal.App.2d p. 363, 250 P.2d p. 333; Priest v. Bell, *supra*, 123 Cal.App.2d 528, 531, 267 P.2d 49.)

* * * * *

We next consider the course of conduct wherein the decedent, after the execution of the deed and the alleged delivery thereof, continued to live on the premises, permitted her husband to pay all of the taxes from community property (his earnings) and to use the same funds to pay for insurance and various maintenance costs. . . . Under the present state of our decisional law, however, the exercise of acts of ownership or dominion by the grantor, as well as the absence of such acts on the part of the grantee, are evidentiary circumstances which are weighed by the trier of fact against the *inference* of delivery. As pointed out in Estate of Galvin, the acts of control by the grantor do not vitiate the title of the grantee *where there has been a delivery*, nor are they shown for the purpose of vitiating the deed. "They were circumstances which if standing alone might not evidence nondelivery, but which added to all the other circumstances in the case strongly show that there was no delivery." (114 Cal. App.2d p. 363, 250 P.2d p. 338.) Belli, which held there *was* a delivery under the facts of the case, reiterated the rule that the "[p]ayment of taxes and keeping up insurance by the grantor are consistent with the intent to pass title." (167 Cal.App.2d p. 280, 334 P.2d p. 199.) Belli does not hold that such circumstances

may not be considered in determining whether or not the grantor intended to pass title immediately. While Belli follows Stewart in holding that possession of the deed by the grantee raises a presumption of delivery, the essence of its holding is that the payment of taxes and insurance by the grantor and the other circumstances presented did not prevail against the presumption.

Exercise of dominion over property after the execution of a deed is incompatible with delivery and inconsistent with divestiture of title. (*Condencia v. Nelson*, supra, 187 Cal.App.2d 300, 303, 9 Cal.Rptr. 759; *Owens v. Ring*, 117 Cal.App.2d 672, 677, 256 P.2d 1040.) While such dominion does not negate delivery as a matter of law, its incompatibility with delivery renders it a circumstance to be considered by the trier of fact on the question of delivery or nondelivery, particularly when coupled, as here, with the circumstance of nonexercise of dominion by the grantees.’”

In *Atlantic Nat. Bk. of Jacksonville v. St. Louis Union Tr. Co.*, 211 S.W. 2d 2, the Court Stated as Follows.

“The indenture further provided that, ‘from and after my decease, this conveyance remaining unaltered or unrevoked’, the named trustees ‘shall forthwith take, hold, manage and control’ Clark’s assets, make payment of the ten specified gifts or bequests and administer the purported trust as therein provided. All that was accordingly done. After Clark’s death the trustees collected and took physical possession of all of Clark’s property, paid his funeral expenses, the expenses of his last illness, his premortuary debts, and the ten special

gifts or bequests, and proceeded generally as though they were executors and trustees under a trust created by will.

The plaintiff bank contends, (1) that the indenture was absolutely void for all purposes, and created no trust whatever because it conveyed neither legal or equitable title to Clark's property in praesenti, (2) that there was no delivery of the property nor any possession thereof by the trustees until after Clark's death, (3) that since the indenture was not executed in accordance with the statute of wills it was at most a mere abortive and ineffectual testamentary disposition, (4) that the indenture being void, attacked thereon by plaintiffs is not barred by estoppel, nor by limitation, and (5) that at Clark's death his property descended to his heirs and the present corpus should now be awarded to plaintiff bank as Snyder's executor. The individual plaintiffs likewise contend the indenture is void.

The defendant contends, (1) the indenture created a valid express trust inter vivos, (2) that because Snyder accepted and executed the purported trust for 44 years, his executor is estopped to attack its validity, and the claim of plaintiff bank is barred by limitations.

Other points are raised and argued in the briefs but in the view we take of the case it is unnecessary to either state or discuss them.

As conceded by all the parties, the indenture cannot be held valid as a will, it not having been executed in accordance with the statute of wills. Nor can the indenture be given any effect as a mere *dec'd inter vivos*. It is unquestionably testamentary in character, was intended to be operative only in futuro and there was no delivery of the subject matter. Professor Scott,

in 43 Harvard Law Review, 521, 522, in his discussion of 'Trusts and the Statute of Wills' states: 'If the owner of securities or other personal property intends to make a gift of them but the gift is incomplete for lack of delivery, the donee takes nothing; and if the gift was intended to be upon trust for a third person, no trust arises'. See also *In re Franz Estate*, 344 Mo. 510, 127 S.W.2d 401, *Allen-West Commission Co. v. Grumbles*, 8 Cir., 129 F. 287, 290.

But whether a completed express trust is sought to be established by parol or by a written instrument, the evidence relied upon to establish it must be clear and convincing and so full and demonstrative as to remove from the mind of the chancellor any reasonable doubt with respect thereto. *Harding v. St. Louis Union Trust Co.*, *supra*, *Northrip v. Burge*, *supra*, *Eschen v. Steers*, *supra*, *United States v. Certain Land. etc.*, D.C. 70 F.Supp. 730.

While here there was no delivery to the trustees, during Clark's lifetime, of possession of any of Clark's property, defendant contends that notwithstanding there was no physical delivery the indenture itself so sufficiently transferred present title as to satisfy the demands of the law. This calls for examination and analysis of the indenture.

In the indenture, after purporting to 'give, grant, assign, set over and convey * * * all and singular my goods, chattels, effects and choses in action' to the trustees, 'to have and to hold said goods,' etc., '* * * and every part and parcel and increment thereof, and such as may be during my life obtained in exchange, lieu or stead thereof', Clark immediately thereafter limited such purported conveyance in these words: (1)

“* * * upon the following special trust, confidence, and express conditions, namely’:

(a) ‘That I, the said Silas H. H. Clark shall be permitted to *use, occupy and enjoy* all and singular said goods, * * * and every part and parcel thereof, as well as any and all increment arising therefrom, during my natural life, without paying anything for the same or in respect thereof,

(b) ‘That from and after my decease, * * * the said trustees * * * *shall forthwith take, hold, manage and control* the goods, chattels and effects, and every part and parcel thereof, as well as any increment thereof’. (Emphasis ours.)

‘The context clearly indicates that Clark had some particular purpose in his expressed limitation in reserving to himself the right to “use, occupy and enjoy” his property. Those are words of legal significance. The verb “use” is defined by Webster as “to convert to one’s service”, or “to avail oneself of” or “to put into operation” or “to cause to function”. In *Ex parte Smith*, 212 Ala. 262, 102 So. 122, 125, “use” is said to mean, “to employ for any purpose”. In *Kennedy v. Pittsburgh & L. E. R. Co.*, 216 Pa. 575, 65 A. 1102, 1103, as to the meaning and scope of the verb ‘use’, respecting both real and personal property, it is said: ‘The power to use the principal means the power to consume, and the power to consume real estate necessarily includes the power to convey’. The *Century Dictionary* defines the verb ‘to use’ as meaning ‘to consume or expend’. The reserved dominion, as in the instant instrument, and under the instant circumstances, to use securities, money, personalty and choses in action, of necessity includes the right to employ it, invest it, expend and alienate it as desired.

The employment of the verb 'use', when not modified by words restricting such use to a particular purpose, includes its use in any form or in any manner. *Mitchell v. Board of Curators of Morrisville College*, 305 Mo. 466, 266 S.C. 481.

Likewise, the words of limitation used in (b), above, are highly significant and indicative of intention to pass no title in praesenti. Clark stated that 'from and after my death' (i.e., forward from Clark's death, but not before), the trustees, 'shall forthwith take, hold, manage and control' his property. In those words there is indicated every intention of Clark to withhold the passing of both title and possession until after his death. 'Forth' is defined by Webster as 'forward, onward in time'. 'Forthwith' is there defined as 'within a reasonable time'. Forthwith means thereafter, and within a reasonable time thereafter. In *Empire Properties Corporation v. Manufacturers Trust Co.*, 262 App. Div. 166, 28 N.Y.S.2d 376, 379, 380, wherein the provisions of a trust indenture required the 'forthwith' cancellation of certain bonds under certain circumstances, the Court said: 'The word "forthwith" connotes a present or an immediately future cancellation and does not refer to bonds concededly cancelled long prior to the sale in question'. Clark intended that not until his death but that from and after his death, and within a reasonable time after his death, the trustees should take both title and possession; that the trustees then, but not until then, should 'take, hold, manage and control', his property. The words 'take, manage and control' used in (b), *supra*, are not theretofore used in the indenture. 'Take' is defined by Webster as, 'to get possession and control of'. In *Whitworth v. Carter*, 39

Ga. App. 625, 147 S.E. 904, 905, it is said: ‘“To take,” in a general sense, means to get or gain possession, where it was theretofore held by another.’”

By the words he used Clark intended the trustees, after his death, should *then* take title and possession of only such property as he should own at the time of his death. That Clark may have had a desire or intention that ‘from and after’ his decease a trust should then come into existence is not sufficient. To have effected a valid trust, as of the time of the execution of the indenture Clark must have parted with dominion over the legal title. *Odom v. Langston*, 355 Mo. 115, 195 S.W.2d 466, *Eschen v. Steers*, supra. That he did not do. Likewise, as of the time of the execution of the indenture the cestuis qui trust must have acquired an enforceable equitable interest in the trust res by the terms of the indenture itself. That they did not acquire. The terms of the indenture left the entire matter executory. There having been no delivery and having specifically retained to himself the use and enjoyment, and, as owner, being entitled to its possession and beneficial enjoyment, Clark could not change himself from such an owner with all attributes of possession and dominion, to that of a trustee holding for the beneficial enjoyment of another, unless the indenture, facts and circumstances unequivocally indicate he intended to make such a change in position. No such intention is indicated.

We agree with defendant’s contention that a mere reservation of power to revoke, when not followed by actual revocation, does not impair a trust or render it invalid, if title actually passed to the trustees by execution of the indenture itself. *Sims v. Brown*,

252 Mo. 58, 158 S.W. 624. But while the words of conveyance in the opening paragraph and in the habendum of this indenture indicate an intention, mere expression of intention unaccompanied by actual passing of title in praesenti, or transfer of possession of the corpus, falls far short of creating a voluntary express trust.

“The above conclusion is supported by the persuasive construction which Clark and the trustees placed upon the indenture after November 9, 1898 and until Clark’s death in 1900. *Warne v. Sorge*, 258 Mo. 162, 167 S.W. 967, 969, *Harding v. St. Louis Union Trust Co.*, supra. Clark’s complete dominion over, his use and alienation as desired of his assets, while not wholly controlling, deserve consideration. In one bank account alone, in Omaha, he deposited and mingled with his general funds many smaller amounts earmarked as income on securities. The record before us shows that he withdrew quite substantial amounts of \$30,000 and \$6,000, plainly to purchase new securities. He deposited large amounts, \$16,800 and \$14,040 obviously realized from the sale of securities owned and possessed by him before November 9, 1898. After Clark’s death, but not until then, his trustees proceeded generally as executors and collected his assets, paid his bills and discharged the \$83,500 in specific bequests.

* * * * *

“We hold that the instant indenture by its execution conveyed neither the legal nor equitable title to Clark’s property. There is certainly no retention of title in Clark as trustee in this indenture. After its execution Clark’s title to and dominion over his property was still absolute. The indenture therefore created no trust whatever, and was utterly void ab initio.”

Restatement of the Law of Trusts, 2nd Edition.

“§26. *No Intention to Create a Present Trust.*

“A manifestation of intention to create a trust inter vivos at some time subsequent to the time of the manifestation does not create a trust.

“COMMENT:

“a. *Scope of the rule.* The rule stated in this Section is applicable whether the settlor manifests an intention to create a trust by transferring property to another person as trustee or by declaring himself trustee.

“Where the trust is to arise only on the death of the settlor, the disposition is testamentary and is invalid unless the requirements of the Statute of Wills are complied with. See § 56.”

“§ 32. *Conveyance Inter Vivos in Trust for a Third Person.*

(1) Except as stated in Subsection (2), if the owner of property makes a conveyance inter vivos of the property to another person to be held by him in trust for a third person and the conveyance is not effective to transfer the property, no trust of the property is created.

(2) Not applicable.

“COMMENT:

“a. *Ineffective conveyance.* Where the owner of property makes a conveyance to another person as trustee, the conveyance may be ineffective to transfer title to the property. The conveyance may be ineffective for want of delivery of the subject matter or of a deed of conveyance. It may be ineffective because it is not intended to be presently effective.

(c) *No intention to make a present transfer.* If the owner of property surrenders possession of the subject matter or of a deed of gift which would be otherwise sufficient to transfer the property, but he does not manifest an intention to make a present transfer of the property, there is no present transfer of the property and no trust is created. See § 26."

"§ 56. *Disposition Inter Vivos Where Death of Settlor is a Condition Precedent.*

"Where no interest in the trust property is created in a beneficiary other than the settlor before the death of the settlor, the disposition is testamentary and is invalid unless the requirements of the Statute of Wills are complied with.

"COMMENT:

"a. *Scope of the rule.* Where the settlor makes a conveyance of property in trust, the intended trust may fall on the ground that it is not created prior to his death. This is the case where the conveyance is ineffective to transfer the property during his lifetime, or where although the conveyance is effective to transfer the property the beneficiary is not designated during his lifetime. The intended trust may fail, therefore, either (1) where the conveyance is incomplete for want of delivery or because it was not intended to be effective until the settlor's death; . . . No trust arises on his death unless the requirements of the Statute of Wills are complied with.

"b. *Conveyance incomplete at settlor's death.* If the owner of property purports to transfer it to another person in trust but the conveyance is incomplete at the time of his death, the intended trust is invalid unless

the provisions of the Statute of Wills are complied with. Thus, if the title to the property does not pass to the intended trustee because the conveyance is incomplete for want of delivery, no trust arises during his lifetime, and no trust arises on his death. So also, if the owner of property delivers it or delivers a deed of conveyance to the intended trustee, but he manifests an intention that the conveyance shall not be effective until his death, the disposition is testamentary . . . in all these cases the conveyance of the property is incomplete at the death of the owner, and no trust arises on his death since the disposition is testamentary, unless the requirements of the Statute of Wills are complied with."

Scott on Trusts.

"§ 56. *Disposition inter vivos where death of settlor is a condition precedent.* The owner of property may intend to create a trust of the property, either by transferring it to another person as trustee or by declaring himself trustee of it. In either event, if the beneficiaries do not acquire any interest in the property prior to his death, the transaction is clearly testamentary and invalid unless there is a compliance with the requirements of the Statute of Wills. If he intends to create a trust by transferring the property to another person as trustee, the beneficiaries may fail to acquire any interest during the lifetime of the settlor, either because of his failure during his lifetime to make an effective conveyance to the trustee or because, although the conveyance is effective, there is no effective disposition of the beneficiary's interest prior to his death.

"§ 56.1 *Conveyance incomplete at settlor's death.* If the owner of land executes a deed purporting to

convey the land to another, but manifests an intention that no interest is to vest in the grantee prior to the death of the grantor, the conveyance is incomplete, and on the grantor's death the grantee is not entitled to the land. The result is the same where the conveyance is to the grantee in trust for a third person; if the conveyance is incomplete at the grantor's death, neither the trustee nor the beneficiary takes any interest in the land. Thus a conveyance of land is ineffective where there is no delivery of the deed to the grantee or to a third person and the grantor retains control of the disposition of the property during his lifetime; and if the grantee is named as trustee for a third person, no trust arises.

“If the owner executes a deed and delivers it to the grantee, but it is provided in the deed that it shall have no effect until the grantor's death, the disposition is testamentary, and the grantee is not entitled to the land on the grantor's death. The result is the same where the deed is absolute on its face but it is delivered to the grantee under an agreement that it shall not be effective until the death of the grantor. In such a case if the conveyance is on trust, no trust arises on the grantor's death. If the owner executed a deed purporting to convey the land to another and then delivers it to a third person, with instructions to hold it for the grantor and to redeliver it to him on his request at any time during his lifetime, but if he should not otherwise direct to deliver it on his death to the grantee, the disposition is testamentary. This is because the grantor retains the power to control the disposition of the property as long as he lives. The result is the same whether the grantor in the deed reserves

a life interest or whether the deed is absolute on its face. If the conveyance is on trust, no trust arises on the grantor's death.

"The same principle is applicable to personal property. If the owner of securities or other personal property intends to make a gift of them but the gift is incomplete for lack of delivery or because the donor does not intend it to be effective until he dies, the donee takes nothing; and if the gift is intended to be upon trust for a third person, no trust arises."

"§ 103. *When is a Disposition Testamentary.*

"Whether the gift was testamentary or inter vivos will be decided upon the basis of *the rights and powers which the donor intended the donee to have*, and not merely by a consideration of the exact language in which the gift was framed. But certain phrases may tend to lead the court to find a testamentary intent, as where the subject matter of the gift is described as whatever property the donor has left at his death, or the donee is to take if he survives the donor. The court may also consider a statement by the donor in the instrument that it was or was not intended to be testamentary.

"Often the instrument in question contains an express statement that it is *"to take effect at the death of the grantor."*

**Lawson, et al. vs. Lowengart, et al. 5/17/67 59 Cal.
Rptr. 186, 193, 194, 195.**

"Defendants contend that the trial court erred in its findings that there was not sufficient evidence to establish valid delivery of either the instrument or the trust corpus to the trustees. Delivery is largely a matter of the intent of the donor or trustor and is a ques-

tion of fact to be determined from the surrounding circumstances. (*Miller v. Jansen*, 21 Cal.2d 473, 132 P.2d 801). Under well established rules, the evidence is to be viewed in the light most favorable to plaintiffs and all reasonable inferences are to be drawn in favor of the determination of the trier of fact.

“Usually, the manifestation of the settlor’s intent that the trust take effect immediately is evidenced by his delivery to the trustees of the subject matter of the trust or some act or an instrument indicating the settlor’s relinquishment of dominion over the property. Where the means chosen is an instrument of transfer, the instrument must meet the requirements for a conveyance of the particular kind of property involved (*Bogert, Trusts & Trustees*, 2d ed., §§ 141, 142, pp. 4-9; § 147, p.49; *1 Scott on Trusts*, 2d ed. § 32.2, p.251).

“. . . Defendants, as the parties holding the affirmative and asserting the sufficiency of the gift in trust, had the burden of proving valid delivery to the trustees (*Code Civ.Proc.*, § 1981; *Blonde v. Estate of Jenkins*, 131 Cal.App.2d 682, 686, 281 P.2d 14).

“The actual or symbolic delivery of the securities was essential to complete the inter vivos trust. A delivery by instrument must have the intended effect of divesting the donor of all present control and vesting the trustees with an equitable present right to reduce the fund into possession (*Beebe v. Coffin*, 153 Cal.174, 177-178; 94 P.766). A delivery may be symbolic, such as delivery of a written instrument, without physical delivery of the securities themselves, so long as the instrument is one upon which delivery of the trust corpus might be compelled.

“The mere signing of the instrument by Dr. Maxwell did not constitute delivery nor create a presumption thereof (*Boyd v. Slayback*, 63 Cal.493; *Miller v. Jansen*, supra). * * * Possession by the grantor has been held to raise a presumption of nondelivery (*Tweedale v. Barnett*, 172 Cal.271, 156 P.483; *Lample v. McDougall*, 103 Cal.App.779, 285 P.328).

“The fact that Dr. Maxwell handed the instrument to Mr. Cotton after signing it, did not of itself constitute a delivery to him or authorize him to deliver the instrument to the trustees. The mere handing of an instrument to a third party does not comprise delivery or authorize that person to deliver the same to the assignee unless there are express and definite instructions to that effect and unless such directions are irrevocable and the instrument is placed beyond the assignor’s power of control or recall (*Jeannerette v. Taylor*, 2 Cal.App.2d 568 at p.570, 38 P.2d 831; *Estate of McConkey*, 33 Cal.App.2d 554 at pp. 560-561, 92 P.2d 456; *Bank of America v. Frost*, 205 Cal.App.2d 614, 23 Cal. Rptr.441; *Kunde v. Kunde*, 122 Cal.App.2d 624, 266 P.2d 608).

“If Dr. Maxwell had no intention of divesting herself of control at the time, the handing of the instrument to Mr. Cotton and his manumission of the instrument to the trustees would not constitute a constructive or symbolic delivery sufficient to establish the trust. The Delivery or absence of delivery to the trustees by way of the trust agreement was a question of fact to be determined by the trial court (*Blackburn v. Drake*, 211 Cal.App.2d 806, 27 Cal.Rptr.651). We have concluded upon a consideration of the entire record that the court’s finding that Dr. Maxwell never intended or effected

delivery was sufficiently supported by the evidence.” cf. *Pollard v. Pollard*, 166 Cal.App.2d 698 at pp. 702-703, 333 P.2d 456).

Blonde v. Estate of Jenkins, 281 P.2d 14

“The record is destitute of any evidence that appellant ever asserted any claim to the shares until after the death of Jenkins. Under such circumstances, the claim of a gift can be sustained only ‘by clear and satisfactory evidence of every element which is requisite to constitute a gift.’” *Denigan v. Hibernia Savings & Loan Society*, 127 Cal.137, 141, 59 P.389, 390; *Humble v. Gay*, 168 Cal.516, 520, 143 P.778.

“Gifts first asserted after the death of the alleged donor are always regarded with suspicion by the courts. *Ibid.* Because of the facility with which, after a donor is dead, a fraudulent claim of ownership may be founded on a pretended gift, assertedly made while the donor was living, it is but a salutary precaution which requires explicit and convincing evidence of every element that constitutes a valid gift inter vivos. *Sullivan v. Shead* 32 Cal.App. 369, 371, 162 P.925.

“In order to make a valid gift, a donor must not only make delivery and part with control of the object claimed, but the donor must at the same time have the intention to complete a presently effective gift and a delivery amounting to a presently effective gift and a delivery amounting to a present transfer of title. *Bishop's School Upon the Scripps Foundation v. Wells*, 19 Cal.App.2d 141, 146, 65 P.2d 105; *Knight v. Tripp*, 121 Cal.674, 678, 54 P.267; *In re Estate of McEuen*, 18 Cal.App.2d 180, 181, 63 P.2d 332. And that intention must be executed by a complete and uncondi-

tional delivery. *In re Estate of McEuen, supra; Sullivan v. Shea, supra.* The donee has the burden to prove the gift.”

Scott on Trusts, Third Edition, § 8, Trust & Agency, p. 79.

A person may be both agent of and trustee for another. If he undertakes to act on behalf of the other and subject to his control he is an agent; but if he is vested with the title to property which he holds for his principal, he is also a trustee. In such a case, however, it is the agency relation which predominates, and the principles of agency, rather than the principles of trust, are applicable. This is the case, for example, where the title to bonds or shares of stock of other securities is vested in a person who undertakes to hold subject to the directions of the person who caused the property to be vested in him. He is an agent since he is acting subject to the control of another, even though he is also trustee since he is vested with the title to the property. Where an agent receives money for his principal, he acquires the legal title to the money according to the view that title to money passes with the possession of it; but he is nonetheless an agent, and the principles of agency are applicable.

Restatement of the Law, Agency, Second.

Sec. 14. B. Agency and Trust.

“Comment: c. Whether a person is a trustee, an agent, or an agent-trustee, depends upon the manifestation of intention of the parties. Frequently the intention of the parties is clear, but it is not always so. Which, if either, of the relations is created depends upon the con-

struction of the words used in the light of all the circumstances. If a person receives property from another who manifests an intention that the transferee is to hold the property for the benefit of and subject to the control of the transferor, an agency is created, whether or not title is transferred. * * * If he does not receive title to the property, and is not to act under the control of the other, he is neither an agent nor a trustee of the other.

“Comment f. Where a person transfers property to another, the question whether there is an agency depends upon the amount of control agreed to be exercised by the person for whose benefit the transferee is to act, or; in doubtful situations, upon the amount of control in fact exercised. If it is agreed that the transferor is to have general supervision and can, if he chooses, direct what is, or is not, to be done, an agency is indicated.”

Betker v. Nalley, 140 F.2d 171.

“It is significant that no duty is specified, in the deed of June, 1930, to be performed by the trustees during the lifetime of the grantor, except to *hold* the two parcels. Moreover, this holding was to be for her use and benefit. The record shows that Mrs. Nalley occupied the residence located on parcel (1) as a home continuously until her death. Presumably, there was no duty to be performed by the trustees in connection with its management or control. In fact, the only suggestion of such a duty which can be found in the deed appears in the language of Paragraph (a) ‘* * * she to receive the entire net income therefrom.’ This suggests the possibility that the trustees were to manage parcel (2),

collect the rents and distribute the net income therefrom to the granor. But even this possibility is not supported by the other provisions of the deed. It is apparent that Mrs. Nalley intended to retain management and control of the property as well as power to alienate it. She reserved power (1) to encumber it; (2) to direct the conveyance of the whole property or any part thereof, or any less estate therein, without any powers in her trustees to refuse to act upon her direction or to prevent, limit or control her direction; (3) to join in any such conveyance by signing and acknowledging the same. Her trustees were, in fact, mere agents with very limited powers."

**Warsco v. Oshkosh Savings & Trust Co., 196
N.W. 829.**

"A valid trust implies a donor, a trustee and a cestui que trust, and the donor may be the cestui que trust, or at least one of the cestui trustent. But there must be an alienation of the donor's property constituting the trust to the trustee, and under such terms that, when the trust is executed, a benefit accrues to a cestui que trust unless prevented by a condition subsequent resulting from a lawful revocation of the trust. If the donor has full control and dominion over the trust property, so that according to the terms of the trust he can use it as and when he pleases, the trustee becomes his mere agent to hold title to the property, invest, sell and collect income for him, and pay as he directs. The donor has parted with no dominion over his property nor any part thereof by the terms of the trust, and such an agreement is no valid trust instrument.

“The fundamental element of a trust is that the trust property, so long as the trust lasts, is irrevocably devoted to the benefit of certain specific purposes called cestuis que trustent, of whom the donor may be one. Some one must, by the execution of the trust be benefited in a manner or degree different from that which would have resulted had no trust been created. Hence an instrument whereby the donor retains or may retain the whole beneficiary interest in the trust property by the execution of the instrument according to its terms constitutes no valid trust. In such cases the so-called trustee is only the agent of the donor. And it has uniformly been held that a devise or bequest in trust which is subject to the future directions of the donor is void unless executed in conformity with the statute of wills.”

Restatement of the Law, Second, Trusts 2d.

“Sec. 8. Trust and Agency.

An agency is not a trust.

“h. *Where the agent has title.*

The mere fact that an agent is entrusted not merely with possession but also with the title to property for his principal does not make applicable the rules which are applicable to trusts, but the rules applicable to agency are applicable.”

Bogert, Trusts and Trustees, Second Edition.

“Sec. 15. Agency.

“If property is transferred inter vivos to one who is described as a trustee, with directions as to the disposition of the property on the death of the transferor, and the latter reserves to himself a high degree of con-

trol during his life, it may be found that the transaction amounted to the creation of an agency and not a trust, and that the attempted distribution of the property at the transferor's death was testamentary in character and void because of informality.

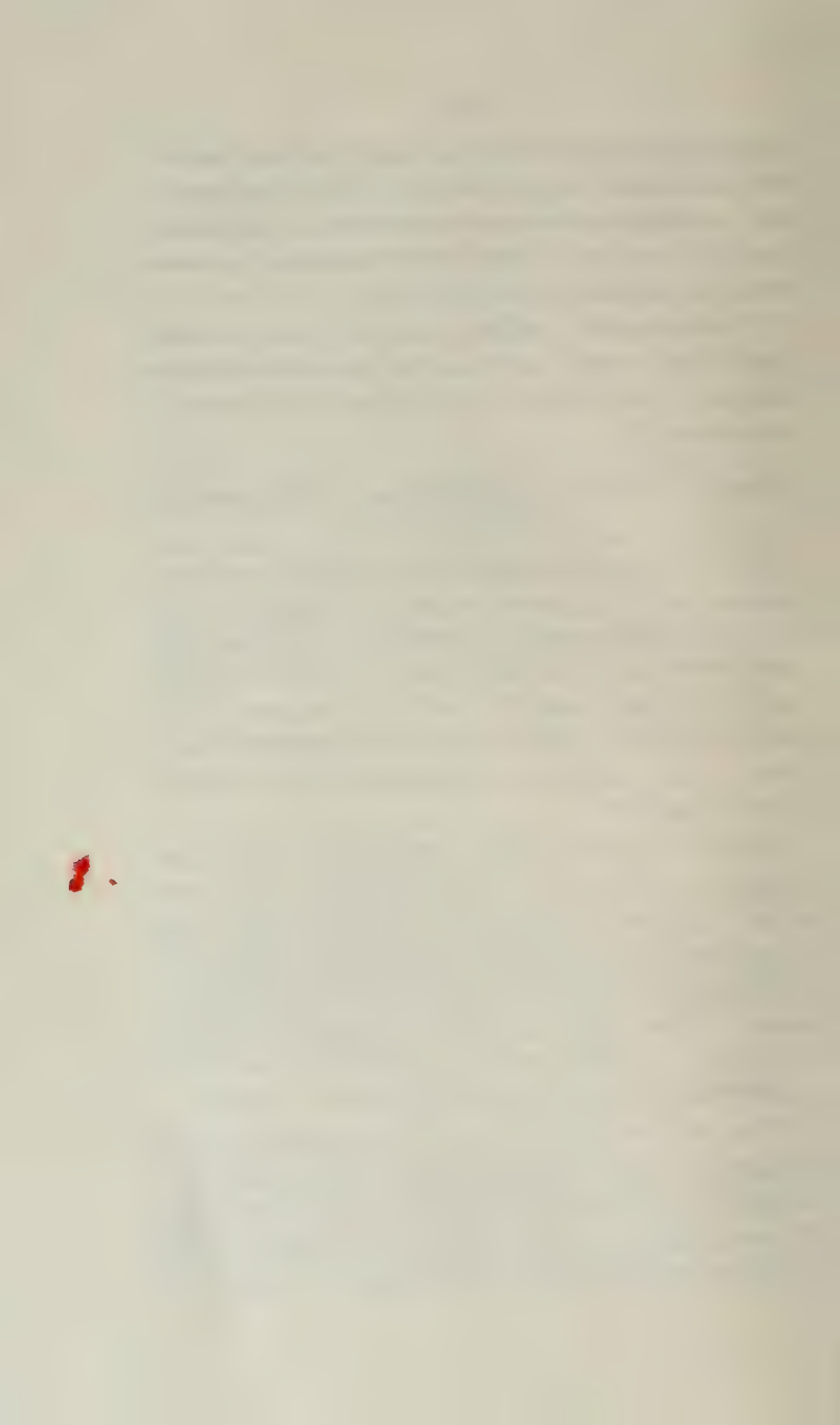
"If a transaction is called a trust but gives too much power to the settlor and leaves the so-called trustee a mere tool, it has been held that there is in reality a mere agency."

Monell v. College of Physicians & Surgeons, 17 Cal.Rptr. 744.

"‘A testamentary disposition of property is a disposition to take effect upon the death of the person making the disposition *and as to which he has substantially entire control until his death*. Such a disposition is testamentary whether made by a will or a document which purports to be a will or made by a transaction inter vivos, as by a deed, unsealed writing or parol declaration or transfer.’”

(Rest. 2d Trusts, Sec. 53, p. 130; see also 1 Scott on Trusts, Sec. 53, p. 61 * * * ‘The result is the same where the agent is entrusted with title since such fact alone does not make applicable the rules which are applicable to the trusts instead of the rules applicable to agency.’) (Rest. 2d Trusts, Sec. 8, Comment h; Rest 2d Agency, Sec. 14B; see 1 Scott on Trusts Sec. 57.2, pp. 449-451).’

“The last authority declares at page 451; ‘If the transaction were one which would involve merely an agency but for the fact that the legal title is technically vested in the person entrusted with possession, it is clear that the disposition is testamentary.’”



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No. 22607

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ATHALIE IRVINE SMITH,

Appellant,

vs.

THE JAMES IRVINE FOUNDATION, a corporation, *et al.*,

Appellees.

Appeal From the United States District Court
Central District of California.

BRIEF FOR APPELLEES.

Jurisdictional Statement.

This Court has jurisdiction in this cause under the provisions of 28 U.S.C. § 1291, by virtue of a Notice of Appeal, filed December 18, 1967 [Clk. Tr. p. 187] from a final Judgment entered in the United States District Court for the Central District of California on December 18, 1967 [Clk. Tr. p. 189].

The jurisdiction of the District Court was conferred by 28 U.S.C. § 1332 by virtue of an Amended Complaint for the recovery of personal property exceeding the value of \$10,000.00, exclusive of interest and costs, which shows diversity of citizenship between plaintiff and defendants [Clk. Tr. p. 4].

STATEMENT OF THE CASE.

More than 30 years have passed since the charitable trust, which is the subject of this action, was established by a written Indenture of Trust by and between James Irvine, as trustor, and the James Irvine Foundation, as trustee. Over those years trust income of approximately 6.5 million dollars has been distributed by the Foundation to worthy charities in the State of California in accordance with the provisions of the Indenture of Trust.

The plaintiff, a granddaughter of the trustor, seeks in this action to invalidate the trust and to recover the trust property, which consists of a majority of the outstanding capital stock of the Irvine Company, for herself and the other beneficiaries of the estate of James Irvine, deceased. Plaintiff has not been joined in this effort by the other beneficiaries of Mr. Irvine's estate, all of whom were made parties to the action on motion of the Foundation. Some of the beneficiaries took no position in the case. Others, including Kate L. Wheeler, who is also a granddaughter of Mr. Irvine, and the beneficial owner of the largest interest in his estate (4/8ths), opposed the plaintiff's claims and requested that the District Court enter a judgment upholding the validity of the trust and the Foundation's ownership of the trust property. Gloria Wood Irvine and Security First National Bank as executors and trustees of the estate of Myford Irvine, deceased, joined Mrs. Wheeler in this request and in their post trial brief (pp. 2-3) advised the District Court:

“If the litigation is viewed by the Myford Irvine interests only from a selfish, financial standpoint, it might well be to their benefit in dollars and

cents if the Court held in favor of plaintiff. The Myford Irvine interests are both heirs-at-law and resulting beneficiaries under the will of James Irvine. The tax consequences of a decision for plaintiff are impossible to anticipate with any certainty and could be extremely costly, but the value of the common stock in the Irvine Company held by the Foundation is also very great indeed.

“It was the original thinking of the Myford Irvine interests that they perhaps should not urge the Court to find in favor of either plaintiff or defendant Foundation.

“Now that all plaintiff’s evidence is before the Court, however, the Myford Irvine interests have concluded and respectfully submit plaintiff’s contentions are not supported by convincing evidence, her theories are highly speculative and nothing more than a wishful attempt to support a case which cannot be supported.”

The prosecution of the superficial claims asserted in this case can be understood only in the perspective of the events of the past ten years. During that period plaintiff has been engaged in a serious effort to disrupt and discredit the management of the Irvine Company to gain the control over its affairs which was denied to her by her grandfather’s gift of the majority stock interest in the Company to the Foundation in trust for charitable uses. In this struggle for power, plaintiff with tiresome repetition has charged every chief executive officer since 1959 [Rep. Tr. p. 1988], all six of the other directors of the Company from 1957 through 1960 [Ex. E, p. 5; Rep. Tr. pp. 1343-1344] and five of the six other directors from 1960 to date [Ex. E-1,

pp. 23, 24-25, 27] with breaches of fiduciary duty, mismanagement, or incompetency [Exs. E, E-1, I-1; Rep. Tr. pp. 1343-1345].

Plaintiff has employed the services of a press agent to give widespread publicity to these unfounded charges [Rep. Tr. pp. 2454, 2467-2497]. They have also been included as allegations in two prior legal proceedings brought by plaintiff where they have been neither substantiated nor found to be creditable [Exs. E, E-1; 224 Cal. App. 2d 50, 36 Cal. Rptr. 270 (1964); 237 Cal. App. 2d 828, 47 Cal. Rptr. 392 (1965)] Plaintiff has also used recording devices concealed on her person and in the living room of her home to make secret recordings of conversations with officers and directors of the Company and meetings of its board of directors [Ex. E-2, pp. 293-301; Rep. Tr. pp. 1446-1450]. In 1961, some of these recordings made in 1959 were delivered by plaintiff's attorney to the California Attorney General [Rep. Tr. pp. 2967-2968], in his statutory capacity as the supervisor of the administration of charitable trusts [Rep. Tr. pp. 2953-2954], and plaintiff's charges were investigated and found to be without merit [Rep. Tr. p. 2963].

The Amended Complaint in this action, which is verified under oath by the plaintiff, alleges that at no time during the interval of 10 years between execution of the Indenture of Trust in 1937 and the death of James Irvine in 1947 did the Foundation "receive or have or own any present or immediate estate or interest or title in or to" the subject 510 shares of Irvine Company stock [Clk. Tr. pp. 7, 8]. However, more than 4 years before making this allegation the plaintiff

verified a complaint* against the Foundation and others in which she alleged as a fact that the Foundation was and had been the owner of said stock at all times since 1937. The allegation in the verified complaint in that action, filed July 31, 1962, was:

“At all times referred to herein and *since 1937 the Foundation has owned and continues to own 51% of all issued and outstanding capital stock of The Irvine Company* and by virtue of said ownership has at all times mentioned herein maintained and continues to maintain voting control of the Company as majority shareholder and through its representatives which it has elected to the Board of Directors of the Company and which constitute a majority of said Board of Directors.” (Emphasis added.) [Ex. E-1, p. 4; Rep. Tr. p. 1350.]

Similarly, in the Amended Complaint in the present action the plaintiff alleges under oath that the Indenture of Trust is invalid and void because its provisions contain “both charitable and noncharitable powers, purposes, uses, and trusts.” [Clk. Tr. p. 8.] This is to be compared with the plaintiff’s deposition testimony in her 1962 action against the Foundation. There she testified under oath:

“Q. Now, you name the James Irvine Foundation as a defendant in this action. What is the James Irvine Foundation, so far as you know?

**Athalie I. Burt and Athalie R. Clarke v. The Irvine Company, The James Irvine Foundation, et. al.*, case number 523887, in the Superior Court of the State of California, in and for the City and County of San Francisco. Judgment in favor of the defendants was affirmed on appeal as to the Foundation by a decision filed November 2, 1965. 237 Cal. App. 2d 828, 47 Cal. Rptr. 392 (1965).

A. It is a charitable trust which was created by my grandfather in approximately 1937, I believe, and it was created so that after his death the income from the Foundation was to go to charity within the State of California and to non-tax-supported schools and individuals—individual students who found it necessary for small loans. And I think that covers it, from what I can recall.

Q. Would you say that you are generally familiar with the document establishing the James Irvine Foundation? A. Generally. There are some of the details of it that I possibly wouldn't remember offhand.

Q. However, you have seen it and read it—
A. Oh, yes, I certainly have.

Q. —and studied it to some extent, have you not? A. Yes.

Q. What stock ownership in the Irvine Company is held by the James Irvine Foundation?

A. Fifty-one per cent." [Ex. E-2, pp. 13-14; Rep. Tr. pp. 1364-1366].

These events are the background for this case and plaintiff's stale and shallow charges that the trust which the Foundation has administered for the benefit of California charities for more than three decades is invalid under virtually every theory discussed in the hornbooks on trust law.

All of the plaintiff's contentions of fact and her legal theories were fully tried and examined in the District Court. Almost 4,000 pages of testimony was taken and 297 documents were received in evidence. Extended post trial briefs of fact and law were filed on behalf of the plaintiff and the defendants. Thereafter, the

District Court, with the benefit of the reporter's transcript of the testimony, prepared and filed its comprehensive and well-documented Memorandum opinion setting forth its findings of fact, conclusions of law and order for judgment (277 F. Supp. 774 (1967)).

In summary, the District Court found:

1. That the executed Indenture of Trust and Mr. Irvine's letter of June 20, 1946, were delivered to the Foundation by Mr. Irvine and thereafter retained by the Foundation;
2. That the delivery of the Indenture of Trust and June 20, 1946 letter effected a present transfer of the subject 510 shares of Irvine Company stock in trust to the Foundation, subject only to being divested by the exercise by Mr. Irvine of his power of revocation;
3. That following execution of the Indenture of Trust and June 20, 1946 letter, Mr. Irvine endorsed in blank the certificates described in those instruments and delivered them to the Foundation and that thereafter during the lifetime of Mr. Irvine the Foundation had in its possession certificates endorsed in blank representing the subject 510 shares of Irvine Company stock;
4. That the delivery of the certificates endorsed in blank effected a present transfer of the subject 510 shares of Irvine Company stock to the Foundation in trust subject only to being divested by the exercise by Mr. Irvine of his power of revocation;
5. That the Indenture of Trust established a valid *inter vivos* trust and not a mere agency and that the Indenture and Mr. Irvine's June 20, 1946

letter effected an *in praesenti* transfer of the subject stock, which was not testamentary in character;

6. That the trust established by the Indenture is limited to solely charitable uses and purposes and is valid under the California law exempting charitable trusts from the rules against perpetuities and restraints on alienation; and
7. That none of the contentions of the plaintiff is well founded.

Plaintiff's appeal presents no meritorious challenge to the District Court's findings. While plaintiff claims that all of the findings are clearly erroneous (App. Op. Br. pp. 9-56), her arguments are based at most on conjecture and a liberal disregard of the settled rule that the evidence must be viewed on appeal in the light most favorable to the prevailing parties and that all intendments and inferences from the evidence must be drawn in support of the findings.

The District Court's Memorandum opinion leaves no room for doubt that its findings are supported by substantial evidence of the highest probative value. This evidence and the plaintiff's contentions as to the findings are reviewed, together with the applicable authorities, in the succeeding parts of this brief.

The thoroughness and accuracy with which the facts are presented in the District Court's Memorandum opinion make it unnecessary to include a detailed review of the facts in this statement of the case. However, the following chronological summary of background facts may assist the Court in identifying the various parties and transactions and their relationship to one another.

The Descendants of James Irvine.

James Irvine (referred to herein as Mr. Irvine) was born in 1867 and died in 1947. He was married to Frances Anita Plum from 1892 until her death in 1909. There were three children of this marriage: James, Jr. (1893-1935), Kathryn Helena (1894-1920) and Myford (1898-1959). Mr. Irvine was remarried in 1931 to Katharine Brown White. There were no issue of this marriage.

Athalie Anita Smith (the plaintiff herein) is the only child of James, Jr. She was born in 1933.

Kate L. Wheeler (one of the defendants herein) is the only child of Kathryn Helena. She was born in 1920.

Linda Jane Gaede (one of the defendants herein) and James Myford Irvine (represented herein by the estate of Myford Irvine) are the only children of Myford Irvine. Mrs. Gaede was born in 1940. James Myford Irvine was born in 1953. [Ex. E-6, p. 5].

The Irvine Company.

The Irvine Company is a West Virginia corporation. It was organized by Mr. Irvine and his nominees in the year 1896 with an authorized capital of \$100,000.00 divided into 1,000 shares of the par value of \$100.00 each. Mr. Irvine served as president of the company from its beginning until his death in August of 1947 [Exs. 11, D, E-6, E-9]. During his lifetime, Mr. Irvine transferred all of the stock of the Irvine Company to members of his family and the Foundation as follows:

- 1921—200 shares to his eldest son James, Jr. After May 21, 1921, this stock was held under the terms of an Indenture of Trust made and entered into on that day by and between Mr. Irvine and James, Jr. [Ex. B-15, Sch. G. p. 3].
- 1923—200 shares to his youngest son, Myford. [Ex. B-15, Sch. G, p. 1].
- 1935—40 shares in trust for the benefit of his wife Katharine Brown Irvine. On January 27, 1931, Mr. Irvine and Katharine Brown White entered into an ante-nuptial agreement under the terms of which Mr. Irvine established a trust of securities for her benefit. The ante-nuptial agreement was modified by a supplementary agreement dated August 17, 1935, under the terms of which 40 shares of stock of the Irvine Company were added to the corpus of the trust. [Ex. B-15, Sch. G. pp. 2-3].
- 1935—50 shares in trust for the benefit of his granddaughter, Kate L. Wheeler (then Kathryn Anita Lillard). Mr. Irvine established the trust by a Declaration of Trust dated August 17, 1935. [Ex. B-15, Sch. G, p. 1].
- 1937—505 shares to the Foundation in trust for charitable uses and purposes. The trust was established by an Indenture of Trust dated February 24, 1937. [Ex. B-15, Sch. N, p. 1].
- 1946—5 shares to the Foundation as an addition to the corpus of the trust established by the 1937 Indenture of Trust. [Ex. B-15, Sch. N, p. 1].

The James Irvine Foundation.

The James Irvine Foundation is a California corporation. It was organized by James Irvine for charitable purposes under the California non-profit corporation laws in the year 1937. Its Articles of Incorporation which were filed on January 6, 1937, provide *inter alia*:

“That this corporation is formed solely for charitable purposes, namely, public welfare, health, education, comfort, happiness and general well-being, particularly of the citizens and residents of the State of California, or any part thereof, and that this is a corporation which does not contemplate pecuniary gain or profit to the members thereof. . . .” [Ex. A].

The first members and directors of the Foundation were Myford Irvine, Katharine Brown Irvine, W. H. Spaulding, N. Loyall McLaren, James G. Scarborough, Paul A. Dinsmore, and A. J. McFadden. At the first meeting of directors held on February 1, 1937, Myford Irvine was elected president, Paul A. Dinsmore was elected vice-president and E. M. Price was elected secretary and treasurer [Ex. A-14, pp. 24-25]. Mr. Irvine was never a member, director, or officer of the Foundation [Rep. Tr. p. 78].

By an Indenture of Trust dated February 24, 1937, and executed by Mr. Irvine as Trustor and by Myford Irvine and E. M. Price on behalf of the Foundation as Trustee, Mr. Irvine transferred, assigned and conveyed to the Foundation 505 shares of the capital stock of the Irvine Company, together with certain other stock and stock interests to be held in trust for charitable uses and purposes. Under the terms of the Indenture, Mr. Irvine reserved to himself a life estate interest in

the stock transferred to the Foundation, including the right to receive the dividends and certain capital distributions and the right to vote the stock during his lifetime. He also retained the power to add other property to the corpus of the trust and to revoke the trust in whole or in part or to withdraw from the trust all or any part of the trust property "by written instrument filed with the Trustee" [Ex. A-1].

At the next regular meeting of directors of the Foundation held on May 25, 1937, the following resolution was adopted:

"RESOLVED, that the acts and deeds of Myford Irvine as President and E. M. Price as Secretary, respectively, of this corporation, The James Irvine Foundation, in executing for and in behalf of and as the corporate act and deed of this corporation, that certain Indenture of Trust dated the 24th day of February, 1937, between James Irvine as Trustor and this corporation as Trustee, and in accepting the trusteeship created by and under said Indenture of Trust and also in accepting delivery for and in behalf of this corporation as trustee under said Indenture of Trust, of the certificates of stock described in said Indenture of Trust, to-wit 505 shares of the capital stock of The Irvine Company, and 12,750 shares of the capital stock of The Moraga Company . . . be, and each and all of said acts are, hereby ratified, approved, confirmed and adopted as the acts and deeds of this corporation to the same effect for all purposes as if expressly theretofore authorized by express resolution of the Directors of this corporation, and this corporation does hereby expressly accept said trusteeship and acknowledges and de-

clares that it holds said shares of stock and the certificates evidencing same, respectively . . . as Trustee under said Indenture of Trust and subject to all the rights and obligations of Trustee thereunder." [Ex. A-14, p. 31].

From February 1937 until June 1946, Mr. Irvine made the following additional gifts to the Foundation:

1937—Absolute gift of an undivided one-half interest in real property at Jackson and Davis Streets in San Francisco (Mr. Irvine owned the other one-half interest), and \$5,000.00 [Ex. A-3].

1938—Absolute gift of real property at 113 Front Street, San Francisco, and \$8,000.00 [Ex. A-4].

1939—Absolute gift of \$15,000.00 [Ex. A-5].

1940—Absolute gift of \$15,000.00 [Ex. A-6].

1941—Surrender of power of Trustor under Indenture of Trust of February 24, 1937, to revoke the trust or to withdraw therefrom any part or parts of the property insofar as said powers apply to the 200 shares of the capital stock of the Irvine Company held in trust under the terms of the Indenture of Trust between James Irvine, Jr. and James Irvine, dated May 21, 1921 [Ex. A-7].

1942—Absolute gift of \$30,000.00 [Ex. A-8].

1943—Absolute gift of \$35,000.00 [Ex. A-9].

1944—Absolute gift of \$15,000.00 [Ex. A-10].

1945—Absolute gift of \$43,000.00 [Ex. A-11].

1946—Absolute gift of Mr. Irvine's contingent remainder interest in the 40 shares of Irvine Company stock constituting a portion of the trust he established for the benefit of his wife, Katharine Brown Irvine [Ex. A-12].

By letter dated June 20, 1946, Mr. Irvine, exercising the powers reserved to him in the 1937 Indenture of Trust, transferred an additional five shares of stock of the Irvine Company to the Foundation as an addition to the corpus of the trust and withdrew the stock of the Moraga Company. In the letter, Mr. Irvine acknowledged receipt of the Moraga Company stock from the Foundation and Myford Irvine on behalf of the Foundation acknowledged receipt of the five shares of Irvine Company stock as an addition to the corpus of the trust [Ex. A-13].

At the next regular meeting of directors of the Foundation held on June 26, 1946, the following resolution was adopted:

“RESOLVED, that the said five shares of stock of The Irvine Company be and they are hereby accepted as an addition to the trust property provided for in that certain Indenture of Trust dated the 24th day of February, 1937, wherein James Irvine is Trustor and this corporation is Trustee; and, the act of the President in accepting said shares of stock be and the same is hereby ratified, confirmed and approved as the act and deed of this corporation.

“FURTHER RESOLVED that the act of the President in returning said 12,750 shares of stock of The Moraga Company to James Irvine pursuant to the request contained in said instrument of said James Irvine dated June 20, 1946, be and the same is hereby ratified, confirmed and approved.” [Ex. A-14, p. 109].

From June 20, 1946, until Mr. Irvine's death on August 24, 1947, he made no additional gifts to the Foundation or additions to or withdrawals from the corpus of the trust established by the 1937 Indenture of Trust [Rep. Tr. p. 77].

Mr. Irvine's life estate interest in the trust property terminated by his death on August 24, 1947. A special meeting of directors of the Foundation was held on September 19, 1947, at which the following resolution was adopted:

“RESOLVED, that the President and Secretary of this corporation be and they hereby are authorized and directed to take all steps and to do and perform all things, for and on behalf of this corporation, that may be necessary to cause the certificates of the capital stock of The Irvine Company, heretofore transferred to and now held by this corporation, to be transferred on the books of The Irvine Company and new certificates representing such shares to be issued in the name of this corporation” [Ex. A-14, p. 121].

On November 18, 1947, said 510 shares of stock of the Irvine Company were transferred on the books of the Company from the name of James Irvine to the James Irvine Foundation and a new certificate for the stock was issued to the Foundation [Rep. Tr. pp. 79-80].

In 1963, the Irvine Company redeemed 10% of its outstanding stock in partial liquidation of the Company. The Foundation surrendered 51 of its 510 shares for redemption, leaving it with a total of 459 shares [Ex. D]. These are the shares which are the subject of plaintiff's action.

ARGUMENT.

I.

Plaintiff Has Failed to Sustain the Burden of Establishing That the Findings of the District Court Are Clearly Erroneous.

Rule 52(a) of the Federal Rules of Civil Procedure provides: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Under this rule the findings of a District Court are presumptively correct and an appellant has the burden of establishing that the findings are not supported by substantial evidence or that the evidence, when taken as a whole and considered in the light most favorable to the prevailing parties, *compels* a contrary finding. *General Casualty Co. v. School District No. 5*, 233 F. 2d 526, 527 (9th Cir. 1956); *Glens Falls Indemnity Company v. United States*, 229 F. 2d 370, 373 (9th Cir. 1955); *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.*, 178 F. 2d 541, 548 (9th Cir. 1949). In considering whether an appellant has sustained this burden, all intendments and inferences from the evidence must be drawn in support of the findings. *Harries v. United States*, 350 F. 2d 231, 235 (9th Cir. 1965); *Wineberg v. Park*, 321 F. 2d 214, 218 (9th Cir. 1963); *Anderson v. Federal Cart-ridge Corporation*, 156 F. 2d 681 (8th Cir. 1946).

In *Wineberg v. Park*, Judge Jertberg stated the rule as follows:

"[The prevailing party] is entitled to have the evidence viewed in a light most favorable to him. We must assume that the trier of fact resolved all conflicts in the evidence in his favor. It is entitled

to all favorable inferences as may reasonably be drawn from the evidence.”

321 F. 2d at 218.

Plaintiff in this case has made no attempt to evaluate the District Court’s findings in terms of the evidence as a whole or to consider the evidence in the light that is most favorable to the prevailing parties. To the contrary, plaintiff has ignored much of the evidence and has based her assertions that the findings are clearly erroneous on selected bits of testimony and fragments of various documents which, at the most, show that there was a conflict in the evidence before the District Court. The plaintiff’s burden in this Court cannot be sustained by such a showing. When confronted with a similar presentation in *Glens Falls Indemnity Company v. United States*, cited *supra*, this Court held:

“It is not the function of this court to retry cases on appeal. Findings of fact by the trial court are presumptively correct and will not be set aside unless clearly erroneous. . . . An appellant’s mere challenge of a finding does not cast the onus of justifying it on this court. The party seeking to overthrow findings has the burden of pointing out specifically wherein the findings are *clearly* erroneous. Appellant has not carried the burden as to any particular challenged finding sufficiently to require or justify a detailed analysis of the evidence, particularly in view of the exhaustive study and discussion of the facts contained in the trial court’s written memorandum. . . .”

229 F. 2d at 373.

Plaintiff also has been less than candid in summarizing the evidence on which she relies to support her arguments. For example, plaintiff asserts:

“It appears from the contents of said letters [between Mr. Spaulding and Mr. Scarborough or Mr. Irvine being Exs. A-15-A-25] that the principal objective to be achieved under the indenture of trust was that Mr. Irvine would remain during his lifetime as the absolute owner of the 505 shares of the Irvine Company stock and that at all times during his lifetime he would have the dominion and control over said Irvine Company stock and The Irvine Company and The Irvine Foundation, as trustee and, furthermore, that the title to the Irvine Company stock would not become vested in The James Irvine Foundation, as trustee, until after the death of Mr. Irvine. This intention on the part of Mr. Irvine is referred to in the letter dated May 25, 1936, from Mr. Spaulding to Mr. Irvine. This letter was introduced in evidence as Exhibit A-15 [Tr. 3679].” (App. Op. Br. pp. 84-85).

These assertions are absolute misstatements as to the content of the referenced letters. They contain none of the statements attributed to them by plaintiff, nor do they contain statements from which plaintiff's assertions could be reasonably inferred. Only a reading of the letters themselves is required to demonstrate this fact.

Similar misstatements, exaggerations and wishful embellishments of the evidence are to be found in virtually every summary of the facts made by plaintiff in her arguments (App. Op. Br. pp. 9-117). To the extent that

plaintiff has given record citations to indicate the basis for her statements, it will be apparent to the Court how very far indeed plaintiff has gone to distort the evidence. In the more numerous instances where plaintiff has given no record citations, her assertions as to the facts may and should be disregarded by the Court.

The plaintiff's argument that the District Court's findings are clearly erroneous is, in substance, that the selected bits and fragments of evidence upon which she relies are entitled to greater weight than the evidence that was accepted by the District Court in making its findings. There is no merit in plaintiff's argument, as is set forth in detail in the succeeding parts of this brief, but it is sufficient here to note that the argument cannot aid the plaintiff in establishing that the findings are clearly erroneous. As this Court held in *Carr v. Yokohama Specie Bank, Limited*, 200 F. 2d 251 (9th Cir. 1952):

"Where there is, as here, a conflict in the evidence it becomes the duty of the trial court to appraise all facts adduced in proof and it is not clearly erroneous for that court to choose between two permissible and conflicting views as to the weight of the evidence. . . . *We may not disturb such a choice by the trier of the facts. . . .*" (Emphasis added).

200 F. 2d at 255.

In *United States v. Yellow Cab Co.*, 338 U.S. 338, 70 S. Ct. 177 (1949), Mr. Justice Jackson, speaking for the Court, reached the same conclusion:

". . . [T]he [appellant] has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion

either way but where the trial court has decided it to weigh more heavily for the defendants. *Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'*" (Emphasis added).

338 U.S. at 342, 70 S. Ct. at 179;

The same rule was applied in *Tonkoff v. Barr*, 245 F. 2d 742 (9th Cir. 1957) :

" . . . [T]he trial judge considered the motives and other indicia of credibility as applied to the various witnesses and was impressed with that evidence which sustained appellees' position. *Under such circumstances it is not our function to substitute our judgment for that of the trial court.*" (Emphasis added).

245 F. 2d at 750.

We respectfully submit that plaintiff has not sustained the burden of establishing that the findings of the District Court are clearly erroneous.

II.

The Foundation Became the Owner of the Subject 510 Shares of Irvine Company Stock by Delivery of the Indenture of Trust and Mr. Irvine's Letter of June 20, 1946.

The District Court held that the delivery of the Indenture of Trust and Mr. Irvine's letter of June 20, 1946, effected a valid transfer of ownership of the subject Irvine Company stock to the Foundation [Clk. Tr. pp. 167-168, 185]. Plaintiff specifies this holding as an error (Specification of Errors Nos. 4, 5, 9, 10 and 12; App. Op. Br. pp. 6-7).

Plaintiff does not deny, and indeed under the law of California, could not deny that the ownership of personal property may be validly transferred as between the parties to a transaction by delivery of a written instrument of conveyance without a transfer of physical possession of the property. *Stone v. Greene*, 181 Cal. 569, 185 Pac. 670 (1919); *Burkett v. Doty*, 176 Cal. 89, 167 Pac. 518 (1917); *Driscoll v. Driscoll*, 143 Cal. 528, 77 Pac. 471 (1904).

In *Burkett v. Doty*, the court stated the rule as follows:

“It must be remembered that, as between donor and donee, it is not necessary to the validity of a gift *inter vivos*, if made by a written instrument transferring the title to the donee, that the possession of the thing given [notes] be passed to the donee. The transfer of the *right* to its immediate possession and control, the title thereto, is sufficient, and the gift then takes effect, although the donor retains all the power of control that can arise from such possession.”

176 Cal. at 93; 167 Pac. at 520.

In the *Driscoll* case, the court reviewed the common law and stated the statutory basis for the rule, in part, as follows:

“Under the common law a gift of personalty effected by a deed operated *proprio vigore* to vest the donee with the title to the property upon the delivery of the deed without a delivery of the thing given. . . . ‘To transfer property by gift, there must be a deed or instrument of gift, *or* there must be an actual delivery of the thing to the donee. Both are not requisite.’ (Citations omitted).

“There is no statutory requirement in this state that a gift which is effected by an executed grant shall be accompanied by a delivery of the property given, and, as between the parties to the transaction, there is no violation of law or infringement of public policy, if the donor, after he has executed the instrument of gift, shall retain possession of the property. A gift is declared by section 1146 of the Civil Code to be, ‘a transfer of personal property,’ which, if made in writing, is by section 1053 called a ‘grant, or conveyance, or bill of sale’; and by section 1083 ‘vests in the transferee all the actual title to the thing transferred which the transferrer then has unless a different intention is expressed or is necessarily implied.’ As under section 1053 of the Civil Code this provision applies to personal as well as real property, the interest intended to be transferred is, under section 1054 of the Civil Code vested in the transferrer upon the donor’s delivery of the grant.”

143 Cal. at 535-36; 77 Pac. at 474.

This rule applies specifically to transfers of corporate stock. *Francoeur v. Beatty*, 170 Cal. 740, 151 Pac. 123 (1915); *Pollard v. Pollard*, 166 Cal. App. 2d 698, 333 P. 2d 356 (1959); *Crocker v. Crocker*, 84 Cal. App. 114, 257 Pac. 611 (1927); *Young v. New Pedrara Onyx Co.*, 48 Cal. App. 1, 192 Pac. 55 (1920); *Equitable Trust Co. v. Gallagher*, 67 A. 2d 50 (Del. 1949); *Estate of Spain*, 46 N.Y.S. 2d 789 (1944); *Leedham v. Leedham*, 254 N.W. 61 (Iowa 1934); *Estate of Valentine*, 204 N.Y.S. 284 (1924). In the words of the court in *Young v. New Pedrara Onyx Co.*:

“Shares of stock are personal property, and there is no reason why, as *between the parties*, they

cannot be transferred as any other personal property. Shares in a corporation are a species of incorporeal property. They exist independently of any certificate. And though it is not uncommon to hear persons speak of the certificate itself as the 'stock,' nevertheless, the certificate that evidences the shares is but the paper representative of the incorporeal right, and stands on a footing similar to that of other muniments of title. It is not in itself the property, but is merely the symbol or paper evidence of the property, and the property right may exist without the certificate. A share of stock being an incorporeal right, incapable of manual delivery, and the certificate being nothing more than evidence of its existence, it is obvious that, in the absence of any controlling statutory inhibition, the shares, without an assignment or delivery of the certificate, may be assigned in any manner appropriate to the transfer of incorporeal personal property, as, for example, by a bill of sale, or any mode that will suffice to pass title to a chose in action or intangible property."

48 Cal. App. at 14; 192 Pac. at 60.

The *Pollard v. Pollard* case, cited *supra*, held that a written assignment was sufficient to effect a valid transfer of stock in trust. It is cited by Bogert for the rule that:

"A trust may be held created where there has been a delivery to the trustee of the instrument of transfer, even though documents representing property transferred were not handed to the trustee."

Bogert, *Trusts & Trustees* (2d ed., 1965) § 148, p. 54, n. 79.

In *Francoeur v. Beatty*, cited *supra*, the California Supreme Court held that an executed written instrument was sufficient to effect an *inter vivos* transfer of stocks and bonds even though it was not accompanied by delivery of the securities. In the words of the opinion:

“The gift was fully and effectually made to defendant when the written instrument in his favor was executed. It was not rendered executory because accompanied by no actual delivery to defendant of the property given; nor did the mere retention itself of the property by Mrs. Hitchcock [the donor] at all affect its validity as a perfect gift. While the Civil Code, section 1147, declares that as to a ‘verbal’ gift it is not valid without there is actual or symbolical delivery to the donee of the thing given, this rule has no application when the gift is effected by an instrument in writing. In the latter case a complete gift is effected without an actual delivery of the subject of the gift.”

170 Cal. at 745; 151 Pac. at 125.

A semantic distinction appears in the cases on this subject. In some it is said that delivery of a written conveyance amounts to a symbolic or constructive delivery of the stock certificate; others state that no delivery of the certificate is required. However, this difference in language has not produced a difference in the decisions. They have held consistently that as between a donor and his donee, delivery of a written assignment is by itself sufficient to complete a transfer of corporate stock, whether the gift is absolute or in trust.

It is equally clear that as between the parties, registration on the books of the corporation is not required to effect a valid transfer of stock ownership. *Field v. Mollison*, 50 Cal. App. 2d 585, 123 P. 2d 603 (1942).

The Uniform Stock Transfer Act (adopted in California in 1931, Corporations Code § 2450, *et seq.*, formerly Civil Code § 330, *et seq.*, and repealed as of January 1, 1965. Calif. Stats. 1963 Ch. 819 § 34), does not limit the means by which the ownership of stock may be transferred as between the parties to the transfer. Notwithstanding the provisions of the Act requiring delivery of the certificate, a valid transfer of stock may be made as between a transferor and a transferee by a written assignment without delivery of the certificate. *Berl v. Rosenberg*, 169 Cal. App. 2d 125, 336 P. 2d 975 (1959); *Hausfelder v. Security-First National Bank*, 77 Cal App. 2d 478, 176 P. 2d 84 (1946); *Kintzinger v. Millin*, 117 N.W. 2d 68 (Iowa 1962); *In re Hill's Estate*, 174 N.E. 2d 233 (Ill. 1961); *Home for Destitute Crippled Children v. Boomer*, 31 N.E. 2d 812 (Ill. 1941). The California court expressly so held in *Hausfelder v. Security First National Bank* saying:

“The Uniform Stock Transfer Act (Civ. Code § 330 *et seq.*) does not forbid gifts of corporate shares by the registered owner. The rights of parties to such a gift as between themselves are the same as the gift of any other movable property.”

77 Cal. App. 2d at 485, 176 P. 2d at 88.

The Supreme Court of Iowa in *Kintzinger v. Millin* cited the *Hausfelder* decision in support of its conclusion that:

“... [T]he rights of the parties as between themselves are not affected by the provisions of the Uniform Act. They are enacted for the protection of the corporation, so it might safely deal in payment of dividends or otherwise with the person in whose name the stock was registered.”

117 N.W. 2d at 76.

In *Home For Destitute Crippled Children v. Boomer*, the trustor executed a trust instrument transferring and assigning certain securities to named trustees for the benefit of a charitable institution. The trust was formally accepted by the trustees, but there was no manual delivery of the certificates representing the securities. They remained in the name of the trustor in a safe deposit box to which he had access. Thereafter, the trustor asserted that the trust was unenforceable because the certificates had not been delivered. The court held:

“Boomer signed and delivered the trust instrument and he testified that he intended to create a trust when he did so. On many occasions thereafter he recognized the existence of the trust. The rights of creditors or of bona fide assignees of the certificates are not involved. The question is solely between Boomer and the trustees. We are convinced that a present unequivocal assignment of shares of stock in a corporation with intention to pass the title will accomplish the transfer of the title to the shares to the assignee as between the parties without delivery of any stock certificate.”

With respect to the Uniform Stock Transfer Act, the court concluded:

“Our view is that the provisions of the Uniform Stock Transfer Act are not applicable to the facts in the instant case. Therefore, we are of the

opinion that the signature and delivery of the trust agreement by Boomer operated immediately to create a valid trust of the stock therein specified without delivery of the stock certificates.”

31 N.E. 2d at 820-821.

The cases cited above are not in conflict with those relied upon by plaintiff. To the contrary the only case cited by plaintiff which touches on this subject, *Lawson v. Lowengart*, 251 Cal. App. 2d 98, 59 Cal. Rptr. 186 (1967), confirms the rule established by the foregoing cases, as appears from the following portion of the opinion quoted in the appendix to plaintiff’s brief:

“A delivery may be symbolic, such as delivery of a written instrument, without physical delivery of the securities themselves. . . .” (App. Op. Br. Appendix p. 60).

The sole question presented by plaintiff’s argument is whether the District Court erred in finding as a fact that the Indenture of Trust and the letter of June 20, 1946 were delivered by Mr. Irvine. The contention by plaintiff that the finding is clearly erroneous is based upon the fanciful assertion that it is not supported by substantial evidence and, with respect to the delivery of the Indenture, that “there is no evidence whatever to support said finding.” (App. Op. Br. p. 25).

We characterize plaintiff’s assertions as fanciful because of the overwhelming amount of substantial evidence in the record, both oral and documentary, which supports the District Court’s findings that the Indenture of Trust and letter of June 20, 1946, were delivered by Mr. Irvine.

In its legal sense "delivery" means:

"... the manifestation of an intention that the instrument in question shall have operative effect. It does not refer necessarily to possession of the instrument or to transfer of the document from hand to hand. It relates to expression of the idea that the document is to cause a change in legal relations at once."

Bogert, *Trusts & Trustees* (2nd Ed., 1965)
§ 147 at 49.

No precise form of words and no particular character of act is necessary to complete a delivery; any conduct of the trustor by which he makes known his intent that the instrument shall have present effect is sufficient. *Lavelly v. Nonemaker*, 212 Cal. 380, 298 Pac. 976 (1931); *Marshall v. Marshall*, 140 Cal. App. 2d 475, 295 P. 2d 131 (1956); *Drummond v. Drummond*, 39 Cal. App. 2d 418, 103 P. 2d 217 (1940).

In *Lavelly v. Nonemaker*, the California Supreme Court stated the rule as follows:

"It is well settled that actual manual tradition or change of possession of a deed is not required to give it validity (Civ. Code, sec. 1059), but that delivery is primarily a question of the intention of the grantor. No particular form of delivery is necessary to give effect to a deed; any words or acts which manifest an intention on the part of the grantor that the deed shall be considered as completely executed and title conveyed are sufficient."

212 Cal. at 387, 298 Pac. at 979.

Moreover, under California law the fact that the Foundation had possession of the Indenture of Trust

and Mr. Irvine's June 20, 1946 letter and produced them in court [Rep. Tr. p. 72; 309-311], gives rise to an inference or, as some cases have referred to it, a presumption of delivery which is *prima facie* evidence that they were "delivered". *Stewart v. Silva*, 192 Cal. 405, 221 Pac. 191 (1923); *Phillips v. Menotti*, 167 Cal. 328, 139 Pac. 796 (1914); *Zihn v. Zihn*, 153 Cal. 405, 95 Pac. 868 (1908); *Belli v. Bonavia*, 167 Cal. App. 2d 275, 334 P. 2d 196 (1959); *California Trust Co. v. Hughes*, 111 Cal. App. 2d 717, 245 P. 2d 374 (1952); *Towne v. Towne*, 6 Cal. App. 697, 92 Pac. 1050 (1907).

In the *Stewart v. Silva* case, the administratrix of an estate brought an action to quiet title to property which her decedent had deeded to the defendant. The plaintiff contended that the deed had not been delivered. The attorney that prepared the deed, his clerk and the defendant all testified that the deed had been delivered. The trial court found that the grantor had executed the deed but that it was not obtained by the grantee until after the death of the grantor and gave judgment for the plaintiff, holding that the deed had not been delivered. The Supreme Court reversed the judgment, holding:

"Even if we assume that the trial court believed and intended to find as a fact that the attorney, his clerk and stenographer, and the defendant deliberately testified falsely as to the delivery of the deed, we still have the presumption of delivery arising from the fact that the grantee in the deed actually had the possession of the deed and produced it in court. This alone constituted *prima facie* evidence of delivery (*Ward v. Dougherty*, 75 Cal. 240, 242 [7 Am. St. Rep. 151, 17 Pac. 193]). It

was there said: 'Possession of a deed of property, however, by the grantee therein named, and upon the same principle by one holding by conveyance of the same property under him, is *prima facie* evidence of its delivery.

" 'The question of delivery being one of fact, and possession being only primary evidence of delivery, he who disputes such fact may rebut the presumption arising from possession by showing that there has in fact been no delivery; but it has been said that where a deed is found in possession of the grantee, nothing but the most satisfactory evidence of nondelivery should prevail against the presumption. (Devlin on Deeds, sec. 294.).' "

192 Cal. at 409-410; 221 Pac. at 192.

Similarly, in *Phillips v. Menotti*, cited *supra*, the court held:

"The production and offer of the deed at the trial was *prima facie* sufficient evidence of its delivery."

167 Cal. at 330; 139 Pac. at 797.

An excellent statement of the burden cast upon the plaintiff by the Foundation's possession of the Indenture of Trust and Mr. Irvine's June 20, 1946 letter is found in *Towne v. Towne*, cited *supra*, as follows:

"The possession of the deed duly executed in the hands of the grantee is *prima facie* but not conclusive evidence of its delivery. It therefore follows that he who disputes this presumption has the burden of proof, and must show that there has been no delivery. And not only must this presumption be overcome, but it is held that there is such

a strong implication that it has been delivered when it is found in the hands of the grantee that only strong evidence can rebut the presumption.”

6 Cal. App. at 701; 92 Pac. at 1052.

The evidence in the record does not aid plaintiff in rebutting the inference of delivery. It establishes with unmistakable certainty that Mr. Irvine “delivered” the Indenture of Trust and his June 20, 1946 letter to the Foundation.

Mr. Irvine employed the services of two attorneys, Mr. Spaulding of San Francisco and Mr. Scarborough of Los Angeles, in planning for the establishment of the Foundation and the trust it was to administer [Rep. Tr. pp. 23-24]. The planning and drafting of the Articles of Incorporation and By-Laws of the Foundation and the Indenture of Trust spanned over a period of more than a year [Rep. Tr. p. 24]. Mr. Irvine conferred with the lawyers and reviewed the several drafts of each document that were prepared [Exs. A-17, A-20, A-21; Rep. Tr. pp. 24-25].

The record discloses that one of the many matters to which Mr. Irvine devoted attention was the provision of the trust indenture which specified the corporate distributions to stockholders which were to be reserved to Mr. Irvine during his lifetime and those that were to go to the trustee [Exs. A-18, A-23].

It also appears that the validity of the *inter vivos* trust to be established by the Indenture was given careful consideration. Under date of June 19, 1936, Mr. Scarborough wrote to Mr. Spaulding, in part as follows:

“As a result of lengthy conferences with Mr. Irvine and Mr. McLaren during the last three days,

numerous changes have been suggested in our respective drafts of the instruments relating to The Irvine Foundation. At Mr. Irvine's request, we have endeavored to correlate all of the suggestions and prepare a composite draft of the proposed declaration of trust, copy of which we herewith forward for your examination. . . .

"From the legal standpoint, we feel assured of the validity of the trust in its present form. . . .

"Furthermore, since the provisions of Probate Code, Sections 41-43 (old Section 1313, Civil Code) apply only to wills and do not affect trusts created during the lifetime of the donor (*Rutherford v. Ott*, 37 Cal. App. 47; *Bowdoin College v. Merritt*, 75 Fed. 480), and since a conveyance of property in trust is not rendered testamentary in character by a reservation by the Trustor of the right to revoke same and to enjoy the rents, issues and profits thereof during his lifetime (*Tenant v. Tennant Memorial Home*, 167 Cal. 57; *Estate of Willey*, 128 Cal. 9; *Noble v. Learned*, 153 Cal. 245, 251; *Niccolls v. Niccolls*, 168 Cal. 444, 446; *American Bible Society v. Mortgage Guarantee Co.*, 217 Cal. 9, 14), the trust would appear safe from attack in this regard." [Ex. A-17].

Mr. Irvine decided against personally serving as a member or director of the Foundation [Rep. Tr. pp. 77-79], but he selected all of the people who served as the incorporators and first members and directors of the Foundation [Rep. Tr. pp. 295-296]. They executed the Articles of Incorporation and the Foundation was established by filing the Articles with the California Secretary of State on January 6, 1937 [Ex. A] and

with the Clerk of the City and County of San Francisco on January 13, 1937 [Ex. A-14, p. 20].

Shortly thereafter, on February 1, 1937, the first meeting of the incorporators and members was held to organize the corporation [Ex. A-14, pp. 20-22]. At this meeting a certified copy of the Articles of Incorporation was presented and ordered filed in the corporate records, by-laws were adopted, a corporate seal was adopted and directors were elected. Following that meeting, the directors held their first meeting to complete the organization; officers were elected, the corporation's principal place of business was established, a depositary was established and the officers were authorized to deposit and withdraw corporate funds, the secretary was authorized to rent a safe deposit box for the corporation; and the three officers, or any two of them, were authorized to enter the box [Ex. A-14, pp. 24-26]. While Mr. Irvine was not a member or director of the Foundation, he attended some of their meetings when he was in San Francisco, including the organizational meetings held on February 1, 1937 [Rep. Tr. pp. 77-79, 323, 330].

From these events and the contemporaneous written record from which they appear, several facts are inescapable:

1. Mr. Irvine desired to establish a trust that would be effective during his lifetime and continue after his death in perpetuity;
2. Mr. Irvine spent considerable time, effort and money for legal assistance to implement his desire in accordance with the applicable law;
3. Mr. Irvine was professionally advised that the trust instrument which resulted from these efforts was

legally sufficient to establish a valid *inter vivos* trust that would be perpetual; and

4. Mr. Irvine brought about the creation of a special entity to serve as trustee which had perpetual existence, was limited to charitable purposes and had, legally and in fact, the capacity, personnel and facilities to administer the trust and to take title to and safely keep the trust property.

On February 24, 1937, twenty-three days after completion of the organization of the Foundation, the Indenture of Trust was formally executed by Mr. Irvine, as trustor. At the same time, the trust was accepted and the Indenture was executed on behalf of the Foundation, as trustee, by Myford Irvine, its president, and by Miss Price, its secretary, and the corporate seal was affixed [Ex. A-1, p. 10]. The paragraph of the Indenture that precedes the signatures and corporate seal reads as follows:

“IN WITNESS WHEREOF, the *Trustor has executed* these presents on the day and year first hereinabove written, and the Trustee has also executed these presents at the same time by its officers thereunto duly authorized, in token of the acceptance by the Trustee of the trusts hereinabove set forth.” (Emphasis added).

Section 1933 of the California Code of Civil Procedure provides:

“The execution of an instrument is the subscribing and *delivering it*, with or without affixing a seal.” (Emphasis added).

Under this statute, the declaration by Mr. Irvine, as trustor, and by Myford Irvine and Miss Price on behalf of the Foundation, as trustee, that “the Trustor

has executed" the Indenture, imports both the signing and the delivery of the instrument. Moreover, section 1055 of the California Civil Code provides that "a grant duly executed is presumed to have been delivered at its date."

The best evidence of what Mr. Irvine intended to accomplish by signing the Indenture and passing it to the officers of the Foundation for acceptance, is, of course, the language of the instrument itself. It does not say that title to the trust property shall not vest in the Foundation until some future date or event or that Mr. Irvine shall retain the title until after his death, as is so frequently verbalized in plaintiff's argument (App. Op. Br. pp. 35, 38, 50-52). To the contrary, it provides:

"That the Trustor *hereby transfers, assigns and conveys* to the Trustee, to have and to hold in trust, nevertheless and for the following trust uses and purposes, the following securities, to-wit:

"-505- shares of the capital stock of The Irvine Company, . . ." (Emphasis added). [Ex. A-1, p. 1].

The words used are very clearly and unmistakably words of *present* transfer which effect an immediate change in the ownership of the Irvine Company stock. The effect to be accorded to such words was well stated by the California Supreme Court in *Burkett v. Doty*, cited *supra*, as follows:

"[A]s the effect of that assignment, according to its terms, was to immediately transfer to the plaintiff the title and ownership of the notes, it constituted satisfactory, if not conclusive, evidence of the intent of the assignor to do that which the instrument, in law, would accomplish, that is, to

divest herself of all right of dominion over the notes and of all present right to, or control over, them, and to make an immediate transfer of the title thereto.”

176 Cal. at 93; 167 Pac. at 520.

The subsequent provisions of the Indenture of Trust confirm that a present transfer of the stock was the intended effect of the instrument. One provision specifies the corporate distributions during Mr. Irvine's lifetime which shall be the property of Mr. Irvine and which shall be paid to the Foundation as part of the trust property. In another provision the right to vote the stock is expressly reserved to Mr. Irvine during his lifetime [Ex. A-1, pp. 2-3]. Such provisions, of course, would have been meaningless and unnecessary unless Mr. Irvine intended the Indenture to effect a present change in the ownership of the stock.

Mr. Irvine signed the Indenture and signified his intent that it should have present operative effect in the manner in which formal deeds and trust instruments are customarily delivered, by passing it to the officers of the Foundation for acceptance. When the Foundation's acceptance was given by execution of the instrument by its president and secretary and affixing its corporate seal, the Indenture of Trust was a completed legal act [Ex. A-1, p. 10]. The endorsement of an acceptance on an instrument of conveyance is evidence of the highest probative value of the delivery of the instrument and the Foundation's formal acceptance endorsed on the Indenture of Trust and Mr. Irvine's letter of June 20, 1946, is by itself sufficient to sustain the District Court's finding that those instruments were delivered.

“‘Where, at the request of a grantor, a person named as trustee in a deed which creates a trust enters his acceptance of the trust created upon such deed, such acceptance presumes conclusively a delivery of such deed by the grantor to the trustee.’”

Hall v. Hall, 47 S.E. 2d 806 (Ga. 1948) at 810.

“Plaintiffs also insist that the trust agreement of September 8, 1933, was never delivered during Price’s lifetime. . . . Manual delivery is unnecessary. *Crow v. Crow*, 348 Ill. 241, 180 N.E. 877. Where a binding agreement is signed by the parties, as in the present case, it is of but little legal significance. Here, defendant had accepted in writing the terms and provisions of the deeds made to him as trustee. This was a sufficient delivery. *Meldahl v. Wallace*, 270 Ill. 220, 110 N.E. 354; *Dickerson v. Dickerson*, *supra*.”

Jackson v. Pillsbury, 44 N.E. 2d 537 (Ill. 1942) at 548.

Mr. Irvine also delivered to the Foundation endorsed in blank certificates representing the stock conveyed by the Indenture. (As appears from the authorities cited in part III *infra*, the delivery of the certificates endorsed in blank was also sufficient to pass title to the stock to the Foundation. However, the delivery of the certificates is relevant to the present inquiry only as further evidence of Mr. Irvine’s intent that the Indenture of Trust have operative effect to transfer ownership of the stock. Since the evidence that establishes delivery of the certificates is reviewed in detail in part III *infra*, it will not be discussed here except where it also pertains to delivery of the Indenture of Trust.)

Mr. Irvine attended the first annual meeting of members and the first regular meeting of directors of the Foundation held on May 25, 1937. At those meetings the members and directors were advised by the president of the execution of the Indenture of Trust, the delivery of the certificates representing the stock and the acceptance of the trust and the stock certificates on behalf of the Foundation by the president and secretary [Rep. Tr. pp. 56-58]. These acts were ratified, approved and confirmed as the acts of the corporation and it was formally acknowledged and declared that the 505 shares of Irvine Company stock and the certificates evidencing the same were held by the Foundation as trustee under the Indenture of Trust by adoption of the following resolution:

“RESOLVED, that the acts and deeds of Myford Irvine as President and E. M. Price as Secretary, respectively, of this corporation, The James Irvine Foundation, *in executing for and in behalf of and as the corporate act and deed of this corporation, that certain Indenture of Trust* dated the 24th day of February, 1937, between James Irvine as Trustor and this corporation as Trustee, and *in accepting the trusteeship* created by and under said Indenture of Trust and also *in accepting delivery for and in behalf of this corporation as trustee under said Indenture of Trust, of the certificates of stock described in said Indenture of Trust, to-wit: 505 shares of the capital stock of The Irvine Company, and 12,750 shares of the capital stock of The Moraga Company, and other property therein mentioned particularly all rights present and future of said James Irvine in certain*

200 shares of the capital stock of The Irvine Company now evidenced by Certificate Number 40, be, and each and all of said acts are, hereby ratified, approved, confirmed and adopted as the acts and deeds of this corporation to the same effect for all purposes as if expressly theretofore authorized by express resolution of the Directors of this corporation, and *this corporation does hereby expressly accept said trusteeship and acknowledges and declares that it holds said shares of stock and the certificates evidencing same, respectively*, and said rights in said 200 shares of stock of The Irvine Company evidenced by said Certificate Number 40, *as Trustee under said Indenture of Trust and subject to all the rights and obligations of Trustee thereunder.*" (Emphasis added). [Ex. A-14, pp. 28, 31].

By statute in California the minutes of the meetings of the members and directors of a corporation are *prima facie* evidence "of the facts or actions stated therein". Calif. Corp. Code § 832, *Duff v. Schaefer Ambulance Service, Inc.*, 132 Cal. App. 2d 655, 673, 283 P. 2d 91, 103 (1955).

The weight to be accorded to the minutes as *prima facie* evidence was well stated by the California Supreme Court in *Miller and Lux, Inc. v. Secara*, 193 Cal. 755, 227 Pac. 171 (1924), as follows:

"Therefore, when *prima facie* evidence of a given fact has been introduced, its effect is not destroyed by the introduction of contradictory evidence. It stands as *proof* of that particular fact unless and until it is *both contradicted and overcome* by such other evidence. 'Proof' is something more

than merely 'evidence.' It is 'the establishment of a fact by evidence.' "

193 Cal. at 770-771; 227 Pac. at 176.

There is no evidence in the record that either contradicts or overcomes the facts and actions stated in the minutes of the meetings of members and directors of the Foundation held on May 25, 1937. Moreover, the accuracy of the minutes was verified by Mr. McLaren who is the only person now living who attended the meetings [Rep. Tr. pp. 55-58]. Accordingly, the minutes stand as proof that:

1. The execution of the Indenture of Trust by Myford Irvine and Miss Price was the act and deed of the Foundation;

2. The acceptance of delivery of the certificates representing the 505 shares of Irvine Company stock by Myford Irvine and Miss Price was the act and deed of the Foundation;

3. The Foundation accepted the trusteeship created by and under the Indenture of Trust; and

4. The Foundation, on May 25, 1937, held the 505 shares of Irvine Company stock and the certificates evidencing the same as trustee under the Indenture of Trust.

Wholly aside from the *prima facie* evidence which the minutes provide under the California statute, they are entitled to great weight in support of the findings of the District Court. They are a formal contemporaneous written record of events that occurred more than 30 years ago. They were prepared in the ordinary course of business at a time when no lawsuit was pending or contemplated and by people who had every reason to accurately state Mr. Irvine's acts and inten-

tions and no personal interest that would have been served by recording the events more favorably to the Foundation than they were. If anything, the transfer of Mr. Irvine's stock to the Foundation was against the pecuniary interest of Myford Irvine, the Foundation's president, since he was then Mr. Irvine's only living child and the heir apparent to a portion of his estate.

After the formal acceptance by the Foundation of the trusteeship of the trust and the delivery of the certificates representing the subject stock, Mr. Irvine acknowledged and confirmed the operative effect of the Indenture of Trust on numerous occasions, both orally and in writing. By letter dated December 18, 1937, Mr. Irvine made an absolute gift to the Foundation of certain real property and money, and stated:

"Specifically this gift is not subject to the terms of the Indenture of Trust *between ourselves* dated February 24, 1937. . . ." (Emphasis added) [Ex. A-3].

This direct and unequivocal confirmation of the operative effect of the Indenture is repeated in substantially the same words in Mr. Irvine's subsequent letters transmitting absolute gifts to the Foundation, dated December 29, 1938 [Ex. A-4], December 28, 1939 [Ex. A-5], December 27, 1940 [Ex. A-6], December 28, 1942 [Ex. A-8], December 29, 1943 [Ex. A-9], December 27, 1944 [Ex. A-10], and December 29, 1945 [Ex. A-11]. The only reasonable inference that can be drawn from Mr. Irvine's repeated references in the letters to "the terms of the Indenture of Trust between ourselves dated February 24, 1937" is that the Indenture had been given effect and was in operation.

Mr. Irvine also verified the operative effect of the Indenture of Trust by exercising the powers reserved to him as trustor under its terms. By letter to the Foundation dated January 31, 1941, he exercised the power reserved to him to withdraw from the trust "by written instrument filed with the trustee" property conveyed to the Foundation by the Indenture. The following portion of the text of this letter shows unequivocally that Mr. Irvine had delivered the Indenture of Trust and understood that it was operative and in effect:

"By an Indenture of Trust between us dated February 24, 1937, I transferred, assigned and conveyed to yourselves, among other property, the following:—

" 'Also, the 200 shares of the capital stock of The Irvine Company now evidenced by Certificate Number 40, and now held in trust under the terms set forth in that certain Indenture of Trust dated May 21, 1921, between James Irvine, Jr., and James Irvine, and all interest, present and future, of the Trustor herein in or to said 200 shares or any thereof.' "

"The 'Trustor herein' was myself, but by said Indenture of Trust of February 24, 1937, it was 'made an express term and condition of this trust that the Trustor may at any time and from time to time, at his sole will and discretion, by written instrument filed with the Trustee, revoke this trust in whole or in part, and may withdraw therefrom all or any part or parts of the property, which may have been contributed to this trust by him', and such 'term and condition' applied, and applies, to said 200 shares.

“It is now my desire to make a present and absolute gift to yourselves, The James Irvine Foundation, of said 200 shares of the capital stock of The Irvine Company and of all my right, title, interest, claim or demand, present or future, in or to said 200 shares of stock or any thereof, and, in furtherance of this gift I hereby terminate said ‘express term and condition’ of said Indenture of Trust dated February 24, 1937, so far only however, and not otherwise, as the same relates to and affects said 200 shares of stock and any right, title, interest, claim or demand on my part therein or thereto, present or future. . . .” [Ex. A-7].

Five years later, by letter dated June 20, 1946, Mr. Irvine again exercised the powers reserved to him in the Indenture of Trust. On this occasion, again “by written instrument filed with the trustee,” he added five shares of Irvine Company stock to the trust property and revoked the trust as to the 12,750 shares of Moraga Company stock (which had been conveyed to the Foundation by the Indenture along with the initial 505 shares of Irvine Company stock) and requested that the Foundation deliver to him a certificate or certificates representing the Moraga stock as required by the provisions of the Indenture [Ex. A-13]. In taking this action, Mr. Irvine made it clear that he was acting under the terms of the Indenture, saying:

“Acting pursuant to the terms of that certain Indenture of Trust dated the 24th day of February, 1937, wherein I am Trustor and The James Irvine Foundation is Trustee, and wherein it is provided in part as follows:

* * * *

“I herewith hand to you as an addition to the trust property of said trust the following securities standing in my name and endorsed by me in blank: . . .” [Ex. A-13].

At the regular meeting of directors of the Foundation held on June 26, 1946, which Mr. Irvine also attended [Rep. Tr. pp. 77-78], the letter from Mr. Irvine dated June 20, 1946, was read by Myford Irvine [Rep. Tr. pp. 74, 1815] and the directors were advised that Myford had accepted the 5 shares of the Irvine Company stock as an addition to the trust property and had returned to Mr. Irvine the 12,750 shares of stock of the Moraga Company which had been withdrawn from the trust by the letter [Ex. A-14, pp. 107-108]. The acts of the president were ratified, confirmed and approved as the act of the Foundation by the adoption of the following resolutions:

“RESOLVED, that the said five shares of stock of The Irvine Company be and they are hereby accepted as an addition to the trust property provided for in that certain Indenture of Trust dated the 24th day of February, 1937, wherein James Irvine is Trustor and this corporation is Trustee; and, the act of the President in accepting said shares of stock be and the same is hereby ratified, confirmed and approved as the act and deed of this corporation.

“FURTHER RESOLVED that the act of the President in returning said 12,750 shares of stock of The Moraga Company to James Irvine pursuant to the request contained in said instrument of said James Irvine dated June 20, 1946, be and the same is hereby ratified, confirmed and approved.” [Ex. A-14, p. 109].

Mr. McLaren and Mr. Gerdes attended this meeting, and both testified that the minutes correctly reflect the action that was taken at the meeting [Rep. Tr. pp. 75, 1815]. As has been discussed previously, the minutes of the meeting are *prima facie* evidence of the facts and actions stated therein. Calif. Corp. Code § 832.

The evidence also discloses that Mr. Irvine orally acknowledged the operative effect of the Indenture of Trust on many occasions.

Sometime before the first regular meeting of directors of the Foundation held on May 25, 1937, Mr. Irvine and Myford Irvine reported to Mr. McLaren that the Indenture of Trust had been executed, the stock certificates had been endorsed in blank and that an acknowledgment had been obtained from Myford Irvine and Miss Price as officers of the corporation "which constituted a formal acceptance of the stock" and that "the only thing that remained was for this act to be ratified by the board of directors at their next meeting" [Rep. Tr. pp. 54-55].

Prior to June 20, 1946, Mr. Irvine conversed with Mr. McLaren about the changes in the trust property that he had under consideration. Mr. McLaren testified regarding the conversation in part as follows:

"Mr. Irvine told me that he only had left five shares of the stock of The Irvine Company, and that by adding this holding to the shares already owned by The Foundation, that it would bring the total holding up to 51 percent, which would clearly establish control, and might at some time have an effect on cumulative voting and matters of that kind" [Rep. Tr. pp. 72-73].

Before Mr. Gerdes prepared Mr. Irvine's will, Mr. Irvine told him on a number of occasions that he had

made a gift of 505 shares of Irvine Company stock to the Foundation in 1937 [Rep. Tr. pp. 1808, 1813]. In connection with the preparation of the will Mr. Gerdes was told by Mr. Irvine that “he had only five shares [of Irvine Company stock] left and that he desired and intended to give that to The Foundation and also at the same time that he intended to revoke the trust insofar as it applied to The Moraga Company stock.” [Rep. Tr. p. 1813].

Mr. Kent A. Sawyer was an attorney engaged in practice, first as an associate and then as a partner, in the firm of Hall, Henry & Oliver in San Francisco from 1944 to 1952 [Rep. Tr. p. 446]. At a conference with Mr. Irvine and Miss Price in Mr. Irvine’s office on June 21, 1946, Mr. Sawyer was advised that the Foundation held stock certificates “transferred” to it by Mr. Irvine endorsed in blank [Ex. A-56; Rep. Tr. pp. 469-470]. At the same conference Mr. Sawyer was told “not in numbers” but the fact that the “shares had been delivered” [Rep. Tr. p. 468].

Mr. Irvine requested an opinion from Mr. Sawyer regarding the validity of the trust established by the Indenture saying that “he wanted to be sure it was valid” and “would like another opinion on it” [Rep. Tr. p. 472]. Mr. Sawyer was furnished with a copy of the Indenture of Trust and by letter dated July 9, 1946, he advised Mr. Irvine:

“In our opinion the rule of *Nichols v. Emery* supra, is still followed to its letter and the trust is *valid*.” (Emphasis added). [Ex. A-57].

A copy of this letter was also sent to Mr. Gerdes [Rep. Tr. p. 1818]. Subsequently, Mr. Gerdes asked Mr. Sawyer for an opinion regarding the applicability of California Probate Code sections 40-43 to Mr. Ir-

vine's gift in trust of Irvine Company stock to the Foundation [Rep. Tr. p. 1819]. Mr. Sawyer responded by letter dated August 26, 1946, in part, as follows:

"Since under California law this trust instrument passes an interest prior to death, although a defeasible one, it is not subject to the above-mentioned provisions of the Probate Code which have reference only to transfers 'by will'. See: *President of Bowdoin College v. Merritt* (1896) 75 Fed. 480; *Rutherford v. Ott* (1918) 37 Cal. App. 47. Unless the holdings of, or views expressed in, the foregoing cases are rejected in any litigation which may arise out of the trusts created for The James Irvine Foundation, I do not see how such trusts can be invalidated. Rejection of the principles of the above cases would also involve repudiation of the decision in *Nichols v. Emery* (1895) 109 Cal. 323 and the long line of cases which have followed such decision." [Ex. A-58].

Mr. Irvine's acts and his oral and written statements reviewed above clearly substantiate the District Court's finding that Mr. Irvine delivered the Indenture of Trust and his letter of June 20, 1946, to the Foundation. The record leaves no room for doubt that Mr. Irvine intended those instruments to be effective immediately to transfer title to the subject Irvine Company stock to the Foundation, as trustee of the trust established by the Indenture. In the testimony of all of the witnesses and in all of the records marked as exhibits, there cannot be found a single act or utterance by Mr. Irvine indicating a contrary intention.

The flimsy nature of plaintiff's argument that the District Court's finding is clearly erroneous is revealed by plaintiff's reliance on the unsupported assertion that Mr. Irvine had possession of the Indenture during his

lifetime (App. Op. Br. p. 22). The District Court rejected plaintiff's contention on the ground, among others, that "there is lacking any evidence showing possession of the indenture by James Irvine following its execution." [Clk. Tr. p. 167]. Moreover, the District Court found that "the indenture of trust was, following its execution, delivered to the Foundation by James Irvine *and it was thereafter retained by it.*" (Emphasis added) [Clk. Tr. p. 168]. Plaintiff asks the Court to overturn this finding not on the basis of a preponderance of contrary evidence, but on the basis of an imaginative speculation. Plaintiff argues:

"The inference to be drawn from said minutes [of the meeting of Foundation directors held on September 19, 1947] is that E. M. Price, as the confidential secretary and agent of James Irvine, had kept said indenture of trust in the safe at Mr. Irvine's office where she had also kept the Irvine Company stock certificates, and that her possession of the Irvine Company stock and/or the indenture of trust, as the agent of Mr. Irvine during his lifetime, continued as the agent of the executors of the Estate of James Irvine after he died, which inference is supported by Exhibits D-2 [Tr. 2328] and D-3 [Tr. 2937], the letters from E. M. Price to Mr. Hellis, as secretary of The Irvine Company, dated respectively November 7, 1947 and November 13, 1947. . . ." (App. Op. Br. p. 22).

Neither the minutes of the September 19, 1947 meeting of the Foundation's board of directors [Ex. A-14, pp. 120-121] nor Miss Price's letters of November 7, 1947 [Ex. D-2] and November 13, 1947 [Ex. D-3] provide any support whatever for plaintiff's conjecture.

Miss Price was the duly elected secretary of the Foundation and had served in that capacity continuously from the first meeting of the board of directors held on February 1, 1937 [Ex. A-14, p. 24] until her death in 1959 when she was replaced by Mr. Beaubien [Rep. Tr. pp. 51-52, 928]. As is customary for corporate secretaries, one of Miss Price's duties as secretary of the Foundation was to keep and maintain its corporate records [Rep. Tr. pp. 904-905; Ex. A-14]. The place where some Foundation records were kept by Miss Price was the subject of the following testimony of Mr. Beaubien on cross-examination by plaintiff's counsel:

"Mr. Young: And there were records kept in the Foundation safe?

The Witness: Yes, Foundation records, yes.

Mr. Young: In her office that she had the safe in?

The Witness: Yes." [Rep. Tr. p. 978b].

The other place where Foundation records were kept and where the certificates representing its Irvine Company stock were kept was a safe deposit box at the vaults of the Crocker First National Bank of San Francisco, which the board of directors authorized Miss Price to rent on behalf of the Foundation on the basis that only its three officers or any two of them could have access [Ex. A-14 p. 26]. The reason the board of directors took this action at their meeting on February 1, 1937 was explained in the testimony of Mr. McLaren, one of the directors who attended the meeting and voted on the resolution, in part as follows:

"Originally in discussions with respect to the formation and operation of the trust it had been sug-

gested that valuable papers be kept in the safe in Mr. Irvine's office. On further reflection—and I don't recall who the suggestion came from—it was pointed out that The Foundation was about to receive a majority of the stock of The Irvine Company, which was extremely valuable, and that therefore it would be wise to deposit that stock, The Moraga Company stock, and such items as the Articles of Incorporation and other valuable documents, in the safest place possible, and that is why the box was rented in the Crocker Bank and authorized at this meeting." [Rep. Tr. p. 50].

The minutes of the special meeting of the Foundation board of directors held on September 19, 1947 [Ex. A-14 pp. 120-121] on which plaintiff relies as the basis for her speculation, disclose (1) that Miss Price attended the meeting in her capacity as secretary (2) that following the adoption of a memorial resolution commemorating the death of Mr. Irvine, the secretary at the request of the president, read the Indenture of Trust and (3) that the directors adopted the following resolution:

"RESOLVED, that the President and Secretary of this corporation be and they hereby are authorized and directed to take all steps and to do and perform all things, for and on behalf of this corporation, that may be necessary to cause the certificates of the capital stock of The Irvine Company, heretofore transferred to and now held by this corporation, to be transferred on the books of The Irvine Company and new certificates representing such shares to be issued in the name of this corporation." [Ex. A-14, p. 121].

It was pursuant to the direction given in the quoted resolution that Miss Price sent her letters of November 7, 1947 [Ex. D-2] and November 13, 1947 [Ex. D-3] to the Irvine Company surrendering the certificates representing the Foundation's stock for transfer into the name of the Foundation on the books of the Company. While plaintiff now speculates that Miss Price might have sent these letters on behalf of the executors of Mr. Irvine's estate, the recipient of the letters in the Irvine Company had no such doubt. He addressed his registered reply to:

"Miss E. M. Price, Secretary
The James Irvine Foundation
820 Crocker Building
San Francisco, California." [Ex. D-4].

There is no evidence in the record whatever to support plaintiff's speculation that the Indenture of Trust was in Mr. Irvine's possession at the time of his death. Moreover, plaintiff is engaged in an idle speculation. After Mr. Irvine delivered the Indenture of Trust to the Foundation, and it was accepted, the legal effect of the instrument would not have been altered if it had been returned to Mr. Irvine or placed in his safe deposit box at the bank for safekeeping. *Stone v. Daily*, 181 Cal. 571, 185 Pac. 665 (1919); *Leydecker v. Warren*, 135 Cal. App. 2d 484, 288 P. 2d 51 (1955).

In *Stone v. Daily*, the California Supreme Court was presented with such a case and held, as follows:

"The case, then, is one where the formality of a delivery is gone through with with the intent of making an immediately effective conveyance, but after delivery the grantor retains possession of the deed for purposes of safekeeping. That such a de-

livery is valid and is not affected by the fact that the instrument subsequently remains in the possession of the grantor is well established. Chancellor Kent, in his Commentaries (volume 4, pages 455, 456), says: 'So, if a deed be duly delivered in the first instance, it will operate though the grantee suffer it to remain in the custody of the grantor. If both parties be present, and the usual formalities of execution take place, and the contract is to all appearances consummated without any conditions or qualifications annexed, it is a complete and valid deed, notwithstanding it be left in the custody of the grantor.'

"In Devlin on Deeds (third edition), section 278a, it is said: 'Where a deed has been duly delivered, the fact that the grantee allows it to remain in the custody of the grantor will not invalidate it. A deed may be returned, after delivery to the grantor, so as to insure that it would not be placed on record without affecting the delivery.' . . .

"Counsel for defendant refer to the language of a number of cases . . . to the effect that 'The essential requisite to the validity of a deed transferred under circumstances as indicated in this case, is that when it is placed in the hands of the third party, it has passed beyond the control of the grantor for all time.' But an examination of these cases shows at once that when they speak of the necessity of the control of the instrument passing from the grantor for all time, they mean control in the sense of power to recall it, control over it as an effective instrument of conveyance, not control in the sense of having the mere physical custody of it."

181 Cal. at 581-582, 185 Pac. at 669-670.

Plaintiff also argues that the tax records of the Foundation (App. Op. Br. pp. 106-109) and the Irvine Company (App. Op. Br. p. 95) support her contention that the District Court erred in finding that Mr. Irvine transferred the 510 shares of Irvine Company stock to the Foundation (App. Op. Br. p. 107). The evidence does not support plaintiff's argument.

With respect to the tax records of the Foundation, plaintiff asserts that the affidavit of Miss Price which was submitted to the Internal Revenue Service (hereinafter referred to as "IRS") to obtain the 1939 ruling [Ex. A-2] that the Foundation was exempt from income tax, did not disclose the Foundation's ownership of the subject stock (App. Op. Br. p. 107). Plaintiff also asserts that the tax returns filed by the Foundation [Ex. 21] failed to disclose its ownership of the subject stock (App. Op. Br. pp. 107-108). Neither of these assertions is true; nor are they particularly relevant in determining Mr. Irvine's intent to make a present transfer of title to the subject stock to the Foundation.

The affidavit of Miss Price, which was sent to the IRS by Mr. Whitehead in June 1939 [Ex. K], cannot now be found [Rep. Tr. pp. 2820-2821]. The same is true as to three of the Foundation's tax returns [Rep. Tr. pp. 2259, 2793]. The Foundation did not have copies of the documents and requested copies of the originals from the IRS [Ex. A-2; Rep. Tr. p. 2793]. The IRS, by letter, advised the Foundation that the documents had been lost or destroyed [Ex. A-27; Rep. Tr. p. 2793].

Mr. Whitehead, who has been a certified public accountant since 1934, was in charge of and prepared all of the Foundation's tax returns [Rep. Tr. pp. 2764,

2785] and prepared all of the accounting exhibits that were annexed to the affidavit of Miss Price which was the basis for the IRS ruling that the Foundation was an exempt charitable organization [Rep. Tr. pp. 2823, 2826]. Mr. Whithead read the Indenture of Trust in 1937 and was told that 505 shares of Irvine Company stock had been transferred to the Foundation [Rep. Tr. pp. 2893-2894]. Mr. Whitehead was also given access to the Foundation's books [Ex. A-76, A-77] and used the information in the books in the preparation of the tax returns as well as the accounting exhibits to Miss Price's affidavit [Rep. Tr. pp. 2819, 2825, 2830].

Mr. Whitehead searched his files but could not find a copy of Miss Price's affidavit [Rep. Tr. pp. 2820-2821]. However, the files did contain a copy of the letter by which he sent the affidavit to the IRS, under date of June 14, 1939, and pencil copies of the accounting exhibits that accompanied the affidavit [Rep. Tr. pp. 2820, 2823]. These exhibits designated "C" and "D" to Miss Price's affidavit were prepared by Mr. Whitehead from a work sheet which contains the information he extracted from the Foundation's books [Rep. Tr. pp. 2826-2828, 2838].

The work sheet (which is the last page of defendant's Exhibit K in the record of this case) lists the property of the Foundation as follows:

"Jackson & Davis— $\frac{1}{2}$ Int.	35,000.00
Front St. property	17,500.00
Irvine Co. 505 shs.	1.00
Moraga Co. 12750 shs.	1.00"

[Ex. K, p. 4].

This information was carried forward by Mr. Whitehead into Exhibit C to Miss Price's affidavit [Rep. Tr. pp. 2828-2829] as follows:

"Real Estate:

Front St. property	17,500.00	
Jackson & Davis—		
½ interest	<u>35,000.00</u>	52,500.00
Interest in securities—nominal value		<u>2.00"</u>

[Ex. K, p. 2].

The Foundation's corporate income tax return for the year ending April 30, 1939, which was signed by Paul A. Dinsmore as vice president and by Miss Price, was forwarded to the IRS along with Miss Price's affidavit by Mr. Whitehead's letter of June 14, 1939 [Exs. K, 21]. The return contained the following statement:

"The corporation is a corporation organized exclusively for charitable purposes, no part of the income of which inures to a shareholder. It operates only as such a charitable corporation and no part of its income is used to influence legislation of any kind.

"Pursuant to the provisions of Article 101-1 of Regulations 101, the corporation has submitted an affidavit of its secretary containing information required by such regulation to establish the exempt status of the corporation under the provisions of Section 101(6) of the Revenue Act of 1938. Said affidavit is incorporated in and made a part of this return by reference." [Ex. 21—Return for fiscal year beginning May 1, 1938 and ending April 30, 1939].

In all of the Foundation tax returns for subsequent years, Mr. Whitehead listed the ownership of first 505 shares and then after 1946, 510 shares of Irvine Com-

pany stock by including in the balance sheet contained in the returns the \$2.00 nominal carrying value assigned to the shares in the Foundation books [Ex. 21; Rep. Tr. pp. 2845-2847]. The same method of reporting the Foundation's ownership of Irvine Company stock was used after the death of Mr. Irvine [Rep. Tr. pp. 2855-2857]. The returns for the years ending April 30, 1948, 1949 and 1950 all contain the same \$2.00 listing for the stock, as appeared in the returns filed prior to Mr Irvine's death [Ex. 21; Rep. Tr. pp. 2855-2857].

Mr. Whitehead alone determined the manner in which the Foundation's ownership of Irvine Company stock under the terms of the Indenture of Trust should be reported in the accounting exhibits to Miss Price's affidavit and in the balance sheets that were included in all of the Foundation's tax returns [Rep. Tr. pp. 2844-2845, 2849-2851]. Mr. Whitehead also had the responsibility of deciding how and what the Foundation was required to report to the IRS under the applicable regulations [Rep. Tr. p. 2849]. The Foundation officers relied entirely on Mr. Whitehead with respect to all tax matters [Rep. Tr. p. 2844].

Mr. Whitehead is a well qualified expert in income tax matters and has done very little other work since about 1935 [Rep. Tr. pp. 2762-2763]. With respect to plaintiff's contention that Mr. Irvine's gifts of Irvine Company stock should have been specifically reported as gifts in the returns, Mr. Whitehead testified in response to questions by plaintiff's counsel as follows:

"Q. Well, in 1938, Mr. Whitehead, wasn't it a fact that the government required all charitable organizations to include in their income tax returns

gifts from any source that exceeded the sum of \$3,000? A. I don't think so, sir.

Q. You don't think so? A. No.

Q. There were no requirements or regulations in that connection at all? A. Not for a charitable foundation. That was my understanding.

Q. Well, your understanding is based upon what source? Did you examine the laws, or are you referring to the regulations, or what? A. I am referring to my understanding of the law and the regulations." [Rep. Tr. p. 2790].

Plaintiff's argument that the Foundation's tax returns were not as complete as they should have been under the regulations is contrary to Mr. Whitehead's testimony that they complied with the regulations [Rep. Tr. pp. 2888-2891]. The same is true of plaintiff's contention that a copy of the Indenture of Trust should have been furnished to the IRS with Miss Price's affidavit (App. Op. Br. p. 108). A reading of the applicable regulations, Article 101.1 [Rep. Tr. p. 2888], is all that is required to establish the accuracy of Mr. Whitehead's opinion that a copy of the Indenture of Trust was not required by the IRS [Rep. Tr. p. 2878].

Plaintiff's contention, based upon the testimony of Mr. Cassels, that the Foundation should have filed a separate fiduciary return for the trust established by the Indenture (App. Op. Br. p. 108) is also lacking in merit. The basis for Mr. Cassels' opinion appears in the following portion of his testimony:

"Q. Is it your contention that under paragraph (4) of section 142 that the trustee, having received no income from the trust and the trust having resulted in no income to the trustee or the

fiduciary, as it is stated here, in the year 1937, was required to file this form under subsection (4)?

A. Well, my answer again to that is: If the trust had net income of \$1,000 or over or a gross of \$5,000 or over then there would be a duty to file a return." [Rep. Tr. p. 3583].

The statute expressly supports the view taken by Mr. Whitehead that no separate fiduciary return was required as to the Foundation's trust [Rep. Tr. pp. 2878-2879]. As stated in Mr. Cassels' testimony, the statute provides that a fiduciary return is not required unless the trust had net income of \$1,000.00, or over, or a gross income of \$5,000.00, or over. The Foundation's trust had no income whatever during Mr. Irvine's lifetime because the income on the trust property had been reserved to Mr. Irvine for life and was never a part of the trust.

The Foundation, like most other corporations, employed an expert to handle its tax matters, furnished him with full information about the trust and its ownership of Irvine Company stock and followed his advice as to the tax returns that were to be filed and the information that was to be included. As has been indicated, Mr. Whitehead's interpretation of the applicable tax regulations and his advices to the Foundation as to how and what they should report to the IRS were correct. However, even if Mr. Whitehead had been wrong and the Foundation had failed to supply some required data to the IRS, the plaintiff would not have been benefitted. Clearly no inference adverse to the Foundation's ownership of the trust property could be drawn from a misinterpretation of regulations by its tax accountant.

With respect to the Company tax returns, plaintiff asserts that the information supplied in Schedule F, Compensation of Officers, shows that Mr. Irvine had not transferred the subject 510 shares to the Foundation (App. Op. Br. p. 95). No such inference can be drawn.

The information supplied was:

“James Irvine, President

Time devoted to business— $\frac{3}{4}$ ths

Percentage of Corporation stock owned—547
common

Amount of compensation—\$12,000.00” [Ex. 3;
Rep. Tr. pp. 2777-2778].

During the war years, from 1941 to 1946, Mr. Whitehead traveled to Los Angeles to review and supervise the Irvine Company tax returns, because the firm was short of qualified tax men in the Los Angeles office [Rep. Tr. pp. 2763-2766]. Mr. Whitehead reviewed the Company returns after they had been prepared by others [Rep. Tr. pp. 2766-2768] and decided how various items should be treated on the returns [Rep. Tr. p. 2769]. Mr. Whitehead approved the listing of “547 common” as percentage of stock owned by Mr. Irvine with full understanding that Mr. Irvine had transferred 505 of these shares to the Foundation. The reason why this listing was not only proper but necessary appears in the following excerpt from Mr. Whitehead’s testimony:

“[Q] At the time that you made reference to the listing on Schedule F which shows under ‘percentage of corporation stock owned common 547’ you were aware of the existence of the trust be-

tween Mr. Irvine and The James Irvine Foundation, were you not? A. Yes.

Q. And you had been preparing The Foundation income tax returns for years prior to that?

A. That is right.

Q. And you were aware of the information that appeared on The Foundation books with respect to the transfer of 505 shares of stock of The Irvine Company to The Foundation? A. Yes.

Q. What, then, when you saw this 547 under this listing, Mr. Whitehead, caused you to approve this, as you testified this morning? A. I think Mr. Irvine had an interest in here which was sufficient to require inclusion in this particular schedule.

Q. What interest are you talking about? A. He had a right to revoke the transfer, he had retained a right to the dividends and a right to vote.

Q. And to you that meant he was an owner? A. That's right. The purpose of this schedule in a corporate return is generally to permit the revenue agent to determine whether the salary is excessive, and if it is a closely held corporation the amount of salary would generally be compared with the total income and with his stock holdings to see whether it was excessive.

In this particular case it was apparent, I think, that Mr. Irvine's salary was not excessive.

Q. Is that because, as to income paid out in dividends with respect to the stock, that is subject to double taxation? A. That's right." [Rep. Tr. pp. 2860-2861].

The District Court reviewed and accepted the defendant's contentions based upon Mr. Whitehead's testimony, as follows:

"They [defendants] assert that the income tax authorities desire the information requested in Schedules F and G for the purpose of passing upon the question as to whether the salaries of the officers of a corporation are reasonable so far as deductions are concerned and that the voting power or control of a corporation by a particular officer is an important consideration in that connection. James Irvine did retain the right to vote the stock in question during his lifetime and to receive the dividends thereon during his lifetime. Therefore, the defendants assert, and correctly so, that, for the purpose of control of the corporation in connection with salaries voted the officers and all other income tax purposes, James Irvine would be regarded by the Internal Revenue Service as the owner of the shares in question." [Clk. Tr. p. 166].

Plaintiff is also in error in her argument (App. Op. Br. pp. 17-18) that the listing of Mr. Irvine as an owner of the subject stock in the minutes of meetings of the shareholders of the Irvine Company is evidence that Mr. Irvine had not previously transferred the stock to the Foundation in trust. The error in plaintiff's reasoning is perhaps best illustrated by her amended complaint, in which it is alleged that plaintiff is the owner of 180 shares of stock of the Irvine Company [Amnd. Compl. p. 2; Clk. Tr. p. 5]. Plaintiff testified that in making this allegation, she did not intend to disavow her 1952 transfer of one-half of those shares in trust to her mother, reserving to herself a

remainder interest which will become possessory on her mother's death [Rep. Tr. pp. 1308-1310]. Plaintiff, with a remainder interest in the shares is of course an owner of them for some purposes just as Mr. Irvine with a life interest in the shares which he transferred to the Foundation was an owner for the purpose of exercising his reserved right to vote the stock at meetings of stockholders. The District Court so held, saying in part:

“It was noted that in the minutes of the annual meetings of the stockholders of The Irvine Company referred to that James Irvine was treated as being the ostensible owner of the 510 shares of stock. While those shares had been endorsed in blank, they had not been transferred on the stock record book of the company. Therefore, of record James Irvine was the only person entitled to vote those shares. He reserved that right in the indenture of trust. He could not have voted them if they had been transferred. Therefore, so far as The Irvine Company was concerned, he was the owner of them for corporate voting purposes. . . .” [Clk. Tr. pp. 166-167].

Finally, plaintiff contends that the District Court erred in assigning to plaintiff the burden of proof as to the facts necessary to sustain her causes of action, including the non-delivery of the Indenture of Trust (App. Op. Br. p. 23) and the non-delivery of the certificates representing the subject stock (App. Op. Br. pp. 25-26). The plaintiff is here engaged in a moot argument.

The District Court found not only that plaintiff had failed to establish the non-delivery of the Indenture

of Trust and the certificates representing the subject stock, but *that the evidence preponderated in favor of a finding that these instruments were delivered to the Foundation by Mr. Irvine* [Clk. Tr. p. 168]. Accordingly, the District Court's finding of fact would have been the same even if the burden of proof had been placed on defendants to disprove plaintiff's allegations of non-delivery.

Moreover, the District Court did not err in placing the burden of proof on plaintiff. State law governs all questions of substantive law in an action invoking the diversity jurisdiction of a federal district court. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938). The allocation of the burden of proof is a question of substantive law. *Palmer v. Hoffman*, 318 U.S. 109, 63 S. Ct. 477 (1943). Hence a federal district court in a diversity case must allocate the burden of proof according to state law, which in this case is the law of California.

Under the law of California, the burden is on plaintiff to prove all of the facts necessary to establish her claim for relief. The California Evidence Code specifically so provides in section 500 (formerly Calif. Code of Civ. Proc. § 1981):

“Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.”

Plaintiff's claim is that the Foundation holds the property of the trust established by the 1937 Indenture on a resulting trust for the benefit of plaintiff and the other beneficiaries of Mr. Irvine's estate. Thus, the burden of proving all of the elements necessary to es-

tablish a resulting trust is on the plaintiff. *Socol v. King*, 36 Cal. 2d 342, 348; 223 P. 2d 627, 631 (1950).

More specifically, plaintiff alleges that the ownership of the subject stock was not transferred to the Foundation because neither the Indenture of Trust nor the certificates representing the stock were delivered by Mr. Irvine. Accordingly, plaintiff has the burden of proof as to all facts necessary to establish the alleged non-delivery of the Indenture of Trust and the certificates representing the subject stock.

Chaffee v. Sorensen, 107 Cal. App. 2d 284, 236 P. 2d 851 (1951).

In *Chaffee v. Sorensen*, the plaintiff commenced an action to quiet title to real property and to cancel a deed executed by the plaintiff's deceased husband to his daughter. The plaintiff alleged non-delivery of the deed. The evidence disclosed that the decedent executed the deed in the presence of his daughter, but that the daughter did not receive possession of the deed; that subsequent to the date the deed was executed, decedent, in a legal proceeding, by way of verified answer and testimony, stated he owned the property; and that the deed was found in the donor's desk when he died at which time it was recorded in the daughter's name. The court held that the plaintiff had not sustained the burden of proving the alleged non-delivery of the deed. In the words of the opinion:

"The burden of proof rested upon plaintiff to prove every element of her case including the alleged nondelivery of the deed. Having failed to sustain the burden which the law casts upon her, and the court having resolved the conflicts, if any,

in the evidence and upon the evidence and reasonable inferences drawn therefrom having rendered judgment against her, she cannot prevail on this appeal.”

107 Cal. App. 2d at 291-292, 236 P. 2d at 855.

The rule applied in the cases relied upon by plaintiff is the same as the rule applied in the *Chaffee v. Sorensen* case. The burden of proof is placed on the party who affirmatively seeks to recover property from another who has the legal title or possession of the property. For example, *Lawson v. Lowengart*, 251 Cal. App. 2d 98, 59 Cal. Rptr. 186 (1967) cited by plaintiff (App. Op. Br. p. 23) was an action to quiet title brought by a plaintiff who had both possession and title to the property. The defendants in the case were affirmatively seeking to recover the property from the plaintiff on the theory that the plaintiff's decedent had conveyed the property to them and the court properly allocated to the defendants the burden of proving the delivery of the instrument on which their right to recover the property depended. On the other hand in *Chaffee v. Sorensen*, cited *supra*, the burden was allotted to the plaintiff to prove *non-delivery* of the deed since the plaintiff was affirmatively seeking to recover property from a defendant who held the title to the property.

In the case at bar, plaintiff is affirmatively seeking to recover property from the Foundation, to which it has both the title and possession and the District Court correctly assigned to plaintiff the burden of proof as to all facts necessary to establish the alleged non-delivery of the Indenture of Trust and the certificates representing the subject stock.

We respectfully submit that the District Court did not err in finding that the Indenture of Trust and the letter of June 20, 1946 were delivered by Mr. Irvine and that the Foundation, as trustee, thereby became the owner of the subject 510 shares of Irvine Company stock.

III.

The Foundation Became the Owner of the Subject 510 Shares of Irvine Company Stock by Delivery of the Certificates Representing the Shares Endorsed in Blank.

Plaintiff does not challenge the settled rule in this State, and elsewhere, that the ownership of corporate stock may be validly transferred as between the parties to the transfer by delivery of an endorsed certificate representing the stock. This is one of the methods of transferring title to shares of stock authorized by the Uniform Stock Transfer Act which was adopted in California in 1931 and remained in effect until January 1, 1965. Calif. Corp. Code § 2466 (formerly Calif. Civil Code § 330.1). While the statute, as appears from the cases cited in part II, *supra*, does not limit the means by which the ownership of shares of stock may be validly transferred as between the parties, it does codify the general rule that delivery of an endorsed certificate is sufficient to effect a valid transfer of the shares of stock represented by the certificate. *Oakland Scavenger Co v. Gandi*, 51 Cal. App. 2d 69, 124 P. 2d 143 (1942); *Hynes v. White*, 47 Cal. App. 549, 190 Pac. 836 (1920); *Coward v. DeCray*, 38 Cal. App. 290, 176 Pac. 56 (1918).

The evidence in the record in this case establishes beyond any plausible doubt that the certificates repre-

senting the shares of stock conveyed by the Indenture of Trust and Mr. Irvine's letter of June 20, 1946, were endorsed in blank and delivered to the Foundation by Mr. Irvine, and the District Court so held, saying in part:

"The Court is of the view that the plaintiff has failed to establish the nondelivery of the certificates for those shares of stock. The Court is of the further view that the evidence preponderates in favor of a finding that, following the execution of the indenture of trust dated February 24, 1937, and his letter of June 20, 1946, James Irvine endorsed in blank the certificates described in those instruments and delivered them to the Foundation and thereafter during the lifetime of James Irvine the Foundation had in its possession certificates for 510 shares of Irvine stock, or those issued in lieu thereof, endorsed in blank. The Court makes that finding." [Clk. Tr. p. 168].

As is true with respect to substantially all of the District Court's findings, plaintiff argues on the basis of supposition and surmise that the quoted finding is clearly erroneous (App. Op. Br. pp. 19-21, 25-26, 52-56). Plaintiff asserts:

"E. M. Price, who was the confidential secretary and agent of Mr. Irvine, as well as his agent and "dummy" secretary and treasurer of the Irvine Foundation, as trustee, knew that Mr. Irvine never intended that said trust would be complete, absolute or operative or effective during the lifetime of Mr. Irvine, and that is the reason that E. M. Price, as the employee and agent of James Irvine, had access to and the custody of the 510

shares of Irvine Company stock and the indenture of trust during the lifetime of James Irvine and following his death, and kept both the stock and the indenture of trust in Mr. Irvine's safe that was located in the private office of Mr. Irvine. Under these circumstances any possession of the Irvine stock and/or the indenture of trust by E. M. Price would be legally the possession of her employer James Irvine. . . ." (App. Op. Br. pp. 20-21).

This assertion is, of course, pure fantasy. There is no evidence in the record that would support such a story and plaintiff has discreetly omitted citations to the record to indicate its source.

Plaintiff's claim that the stock certificates and the Indenture of Trust were kept in Mr. Irvine's safe "in the private office of Mr. Irvine" is contrary to the direct testimony of Mr. George L. Beaubien, who was employed from 1917 until Mr. Irvine's death in 1947 as Mr. Irvine's bookkeeper. He testified:

"Mr. Young: On this 1937 trust indenture, where the Foundation is concerned as I understand your testimony, when is the first time that you saw that document, to your knowledge?

The Witness: Oh, I don't recall. I couldn't tell you.

Mr. Young: After you became Assistant Secretary?

The Witness: Oh, yes, after I became Assistant Secretary.

You see, we had two huge safes. Miss Price had one and I had one.

Mr. Young: You each had your own safe?

The Witness: Yes, we each had our own safe, and she kept all the Foundation records in her safe.

Mr. Young: Did you have the combination to her safe?

The Witness: No.

Mr. Young: Did she have the combination to your safe?

The Witness: Yes, she had the combination to mine.

Mr. Young: And there were records kept in the Foundation safe?

The Witness: Yes, Foundation records, yes.

Mr. Young: In her office that she had the safe in?

The Witness: Yes." [Rep. Tr. pp. 978a-978b].

* * * *

"Q. Were there any stock certificates kept in the safe in the office during this period 1937 to 1947? A. Absolutely not. Probably just overnight, that is all.

Q. But other than keeping something in there overnight, no stock certificates were kept in the safe at the office? A. Oh, no.

Q. During that period of years where were stock certificates and securities and bonds kept? . . .

A. To my knowledge they were all kept in the safe deposit boxes." [Rep. Tr. pp. 901-902].

Plaintiff also contends that the finding that the stock certificates were delivered "is not supported by the substantial evidence in the case." (Specification of Error No. 12; App. Op. Br. p. 26). There is no

merit in this contention as appears from the following summary of some of the evidence which supports the finding.

During the course of planning and drafting the Indenture of Trust Mr. Spaulding, the attorney for Mr. Irvine in San Francisco, had correctly determined that for the purpose of establishing a valid trust and transferring ownership of the subject stock to the Foundation, the certificates evidencing the stock could remain in Mr. Irvine's name without endorsement and without delivery [Rep. Tr. p. 35]. Mr. McLaren, however, was fearful that the Treasury Department might attack the validity of the trust for tax purposes [Rep. Tr. pp. 33-35] and discussed the matter with Mr. Irvine and Mr. Scarborough, the attorney for the Irvine Company, during three days of conferences in June of 1936 [Rep. Tr. pp. 311-312]. The conclusion reached appears in the following excerpt from Mr. McLaren's testimony:

"During the course of that meeting the then preliminary draft of the trust agreement as it related to the transfer of ownership from James Irvine to The James Irvine Foundation was discussed at length, and at that time it was decided that it would be a wise precaution, although perhaps unnecessary under the applicable state laws, to effect a manual delivery of the stock in question after its endorsement by Mr. Irvine, and that also to complete the transaction without any question that there should be a formal acceptance by The James Irvine Foundation of the stock through its appropriate officers." [Rep. Tr. p. 312].

Following the conferences, Mr. Scarborough by letter dated June 19, 1936, advised Mr. Spaulding of the dis-

cussion and suggested "that the certificates of stock remain in Mr. Irvine's name, but that they be endorsed by him and delivered to Miss Price, as secretary of the Foundation, . . ." [Ex. A-17, p. 2]. Mr. Spaulding's reply dated June 22, 1936 (with copy to Mr. Irvine) raised no question as to the suggested delivery to the Foundation of the endorsed stock certificates and stated that the trust instrument was satisfactory to him except for the wording of certain provisions not here relevant [Ex. A-18].

The Foundation was incorporated January 6, 1937 [Ex. A]. At the first meeting of directors, held on February 1, 1937, a resolution was passed authorizing Miss Price, the newly elected secretary of the corporation, to rent a safe deposit box at the vaults of the Crocker First National Bank of San Francisco [Ex. A-14, p. 26]. As to the reason the directors took this action, Mr. McLaren testified:

"Originally in discussions with respect to the formation and operation of the trust it had been suggested that valuable papers be kept in the safe in Mr. Irvine's office. On further reflection—and I don't recall who the suggestion came from—it was pointed out that The Foundation was about to receive a majority of the stock of The Irvine Company, which was extremely valuable, and that therefore it would be wise to deposit that stock, The Moraga Company stock, and such items as the Articles of Incorporation and other valuable documents, in the safest place possible, and that is why the box was rented in the Crocker Bank and authorized at this meeting." [Rep. Tr. p. 50].

“Q. And this resolution authorizing the taking out of a safe deposit box and designating the persons who should have access to that box, that was made in anticipation of the receipt of the stock that was to be granted to The Foundation under the indenture of trust? A. That is correct.” [Rep. Tr. pp. 50-51].

The Indenture of Trust was executed on February 24, 1937 [Ex. A-1]. Less than sixty days thereafter on April 20, 1937, Miss Price rented safe deposit box number 9213 at the Crocker Bank [Exs. A-68; B-54]. Mr. Collum, who was employed at the bank as a vault attendant, assistant manager or manager in its safe deposit department from 1925 until his retirement in 1966 [Rep. Tr. pp. 525-526] recalled Miss Price coming in and selecting the box for the Foundation [Rep. Tr. pp. 610-611].

The “history card” which the bank maintained shows that the Foundation rented safe deposit box 9213 continuously from April 20, 1937 to July 22, 1965 [Ex. B-54; Rep. Tr. p. 542]. In accordance with the resolution adopted at the February 1, 1937 meeting of directors, only the officers, Myford Irvine, Paul A. Dinsmore and Miss Price, or any two of them, were authorized to enter the box [Exs. A-68, A-69; Rep. Tr. pp. 568-572]. Mr. Irvine could not have entered Box 9213 since he had no authorization to do so from the Foundation [Exs. A-14, p. 26; A-69] or under the box rental agreement with the bank [Rep. Tr. p. 623; Ex. A-68].

Sometime after execution of the Indenture of Trust and from one to four weeks prior to the meetings of members and directors on May 25, 1937 [Rep. Tr. p. 316] Mr. Irvine told Mr. McLaren that the stock certifi-

icates had been endorsed and delivered to the Foundation. In response to questions by plaintiff's counsel, Mr. McLaren testified regarding the conversation as follows:

“Q. Did Mr. Irvine ever tell you personally at any time that he had delivered the 505 shares of Irvine Company stock to The Foundation?

A. Yes.

“Q. When? A. That was some time—I can't fix the exact date, but it was some time before the annual meeting of the directors of The James Irvine Foundation, which, as I recall it, was held in May of 1937, and either on the telephone or at his office both he and Mr. Myford Irvine told me that the stock certificates in question had been endorsed and had been delivered to Myford Irvine and Miss Price as the responsible officers of The Foundation, and now that all that remained to be done was the formal ratification of acceptance of the gift by the two officers for The Foundation before The Foundation was in a position to function.” [Rep. Tr. p. 316].

Mr. George L. Beaubien, Mr. Irvine's bookkeeper, also testified to the delivery of the certificates, in response to questions asked by plaintiff's counsel:

“Q. Do you have any personal knowledge about that transaction, the 505 shares of Irvine Company stock into the Foundation? A. Well, I know this, that—of course, everything took place with common knowledge in the office, and when Miss Price received the 505 shares, why, she said, ‘The transfer has been made.’

Q. She told you that? A. Yes.” [Rep. Tr. pp. 968-969].

Mr. Whitehead, the certified public accountant who prepared Mr. Irvine's tax returns from late 1936 or early 1937, until his death [Rep. Tr. p. 2762] also testified to the delivery of the stock in response to questions by plaintiff's counsel:

“Q. Mr. Whitehead, you had notice, as I understood your testimony, that this 505 shares Irvine Company stock or an interest in it had come into the custody of the Foundation? A. Yes.

Q. Is that right? A. Yes.

Q. Did you have notice beside the books that you said you reviewed here this morning, the books maintained by Miss Price? A. Do you mean—I don't know what you mean by notice.

Q. Well, had it come to your attention? A. Well, I had known for—I *had known since 1937 that the 505 shares had been transferred* pursuant to this indenture to The Foundation.

Q. In addition to what you have testified appeared on the books? A. *Yes. I was told this,* and I read the—I read either the indenture or a copy of it.

Q. Of the trust indenture back around the time that it was signed? A. Around that time.” (Emphasis added). [Rep. Tr. pp. 2893-2894].

At the meetings of members and directors held on May 25, 1937, which were attended by Mr. Irvine [Rep. Tr. pp. 77-78] resolutions were adopted which “ratified, approved, confirmed and adopted” the “acts and deeds of Myford Irvine as President and E. M. Price as Secretary . . . in *accepting delivery* for and in behalf of this corporation as trustee under said In-

denture of Trust, *of the certificates of stock described in said Indenture of Trust, to-wit: 505 shares of the capital stock of The Irvine Company, and 12,750 shares of the capital stock of The Moraga Company . . .*” (Emphasis added). The resolution also provided that “this corporation . . . acknowledges and declares *that it holds said shares of stock and the certificates evidencing same . . . as Trustee under said Indenture of Trust and subject to all rights and obligations of Trustee thereunder.*” (Emphasis added). [Ex. A-14, pp. 28, 31]. As has been discussed in part II, *supra*, the quoted portions of the minutes of the meetings are not only entitled to great evidentiary weight as a contemporaneous written record, they are *prima facie* evidence of the facts stated therein that Myford Irvine and Miss Price accepted delivery “of the certificates” representing the 505 shares of the Irvine Company stock on behalf of the Foundation and that it held “said shares of stock and *the certificates* evidencing the same” (Emphasis added) as trustee under the Indenture of Trust. Calif. Corp. Code § 832.

These facts are confirmed by all of Mr. Irvine’s subsequent acts and declarations regarding his property interests. In 1946 Mr. Irvine told Mr. McLaren that “he only had left five shares of the stock of The Irvine Company” and that if they were added “to the shares already owned by The Foundation, that it would bring the total holding up to 51 percent, which would clearly establish control . . .” [Rep. Tr. p. 72].

Mr. Irvine’s last will, which was executed on May 14, 1946, was prepared by Mr. Gerdes [Ex. B; Rep. Tr. pp. 1811-1812]. Prior to that time Mr. Irvine

had told Mr. Gerdes on a number of occasions that he had made a gift of 505 shares of Irvine Company stock to the Foundation in 1937 [Rep. Tr. pp. 1808, 1813]. In connection with the preparation of the will, Mr. Irvine also told Mr. Gerdes that he intended to give his only remaining five shares of Irvine Company stock to the Foundation and to revoke the trust as to the Moraga Company stock [Rep. Tr. pp. 1812-1813]. Other advices which Mr. Gerdes received from Mr. Irvine during the preparation and after execution of the will regarding the delivery of Irvine Company stock to the Foundation appear, in part, in the following portions of Mr. Gerdes' testimony:

“Q. At or about the time that you were engaged in the preparation of Mr. Irvine's will did Mr. Irvine discuss with you any question related to the manner in which he had made transfer of the stock of The Irvine Company to The Foundation? A. Well, he told me that he had made this gift, that he had endorsed the stock in blank and delivered it to The Foundation, to Mr. Myford Irvine and Miss Price, as I recall it.” [Rep. Tr. p. 1816].

On June 21, 1946, Mr. Sawyer, an attorney with the Hall firm, attended a conference with Miss Price and Mr. Irvine in Mr. Irvine's office. During this conference Mr. Sawyer was advised by Miss Price that The James Irvine Foundation *held* certificates of stock transferred to it by Mr. Irvine endorsed in blank, but without registration on the books of the company [Rep.

Tr. pp. 447-448; Ex. A-56]. This fact is recorded in Mr. Sawyer's letter to Mr. Irvine dated the following day, June 22, 1946, as follows:

"In my discussion with you and Miss Price on June 21, it was brought to our attention by Miss Price that The James Irvine Foundation holds the stock certificates transferred by you to it endorsed in blank without registration on the books of corporations." [Ex. A-56].

Miss Price did not advise Mr. Sawyer of Mr. Irvine's gift of 5 shares of Irvine Company stock on June 20, 1946 or show Mr. Sawyer a copy of Mr. Irvine's letter to the Foundation of that date [Rep. Tr. p. 464]. Miss Price did, however, furnish Mr. Sawyer with a copy of the Indenture of Trust [Rep. Tr. pp. 454-455, 462]. Mr. Sawyer testified that the only information that he had as to "what shares of stock were in The Irvine Foundation which had been transferred by endorsement in blank by Mr. Irvine were shares referred to in the trust indenture." [Rep. Tr. p. 465].

By his June 22, 1946 letter, Mr. Sawyer correctly advised Mr. Irvine that under the law of California "delivery of an endorsed certificate passes a valid title irrespective of registration on the books", but continued that the law of the state of incorporation might control whether registration on the books was required [Ex. A-56]. After determining that the Irvine Company was a West Virginia corporation, he then advised Miss Price by telephone and Mr. Irvine by letter [Ex. A-57] that the law of that state was the same and that registration on the books of the company was not required. These contemporaneous written records, pre-

pared by a wholly disinterested witness, are unequivocal evidence that Mr. Irvine had delivered to the Foundation endorsed in blank certificates representing the shares he conveyed to it by the Indenture of Trust.

On cross-examination by plaintiff's counsel, Mr. Sawyer testified that he had been told by Mr. Irvine that the Irvine Company stock had been delivered to the Foundation:

"Q. Mr. Sawyer, did Mr. Irvine ever himself personally tell you that he delivered any Irvine Company stock to The Irvine Foundation? A. To the best of my recollection not in numbers, but the fact was passed on to me.

Q. What's that? A. The fact that shares had been delivered." [Rep. Tr. p. 468].

The delivery of the additional 5 shares of Irvine Company stock to the Foundation was accompanied by a letter from Mr. Irvine dated June 20, 1946. The letter states in substance that Mr. Irvine therewith handed to the Foundation four certificates representing 5 shares of Irvine Company stock, endorsed by him in blank as an addition to the trust property and that he revoked the trust as to the 12,750 shares of the Moraga Company stock and withdrew those shares from the trust [Ex. A-13].

Myford Irvine, as president, received and accepted the delivery of the certificates for the additional 5 shares of Irvine Company stock as an addition to the trust property. In accordance with the request in the letter that the Foundation acknowledge receipt of the certificates for the 5 shares of Irvine Company stock, Myford Irvine signed the receipt that appears beneath Mr. Irvine's signature, as follows:

"I hereby acknowledge receipt on behalf of The James Irvine Foundation from James Irvine of the above-mentioned certificates for five (5) shares of stock of The Irvine Company as an addition to said trust property as provided in the above-mentioned Indenture of Trust, dated the 24th day of February, 1937." [Ex. A-13, p. 2].

At the meeting of directors held on June 26, 1946, Mr. Irvine's letter of June 20, 1946 was read, Myford Irvine reported his acceptance of the 5 shares of Irvine Company stock and the following resolution was adopted:

"RESOLVED, that the said five shares of stock of The Irvine Company be and they are hereby accepted as an addition to the trust property provided for in that certain Indenture of Trust dated the 24th day of February, 1937, wherein James Irvine is Trustor and this corporation is Trustee; and, the act of the President in accepting said shares of stock be and the same is hereby ratified, confirmed and approved as the act and deed of this corporation." [Ex. A-14, p. 109].

The deliveries of the 505 and 5 shares of Irvine Company stock and the 12,750 shares of Moraga Company stock were also recorded in the Foundation's original books of account. From the incorporation of the Foundation on January 6, 1937, until Mr. Irvine's death in 1947, these books consisted of a "Cash Book and Journal" [Ex. A-76], and a "Ledger" [Ex. A-77]. The books were set up during 1937 and thereafter maintained by Miss Price [Rep. Tr. pp. 955, 958, 2865]. She did not keep the books on a daily basis but made entries periodically [Rep. Tr. p. 975]. On occasion she would

ask Mr. Beaubien or Mr. Whitehead for advice regarding the making of a particular entry in the books [Rep. Tr. pp. 975, 2830, 2865-2866]. The first entries in both books were made under date of December 21, 1937.

The Journal contains a listing, by year, of the property acquired and disposed of from 1937 to 1949 and its assigned value. For the year 1937, under date of December 21, appears the entry:

“The Moraga Company	1.	
12750 shares		
The Irvine Company	1.	
505 shares		
Surplus		2.
gift from James Irvine		
as per terms of		
Trust Indenture		
dated February 24, 1937”		
[Ex. A-76, p. 140].		

For the year 1946, under date of June 26, appears the entry:

“Surplus	1	
Moraga Company Stock		1
Trust revoked as to 12750 shares		
of The Moraga Company stock		
The Irvine Company stock	1	
Surplus		1
5 shares gift of James Irvine		
as per terms of Trust Indenture		
dated Feb. 24, 1937		
as per letter dated 6/20/46”		
[Ex. A-76, p. 145].		

The acquisition of the 505 and 5 shares of Irvine Company stock and the acquisition and disposition of the 12,750 shares of Moraga Company stock also appears in the "Ledger", with an appropriate cross-reference to the page in the Journal where the transactions are recorded [Ex. A-77, pp. 3, 4].

Mr. Irvine died on Sunday, August 24, 1947. His personal safe deposit boxes as well as the Irvine Company's box were sealed by the bank on Tuesday, August 26, 1947 [Ex. A-72; Rep. Tr. pp. 586-594]. Mr. Hall, as an attorney for the estate, made arrangements with the office of the Treasurer of the City and County of San Francisco to have the boxes opened and inventoried on September 10, 1947 [Rep. Tr. pp. 1038-1039, 1118-1120], and by letters dated September 3, 1947, Myford Irvine and Mr. Gerdes were advised of the appointment and invited to attend [Exs. B-55, B-56].

On September 10, 1947, Mr. Cames, the examiner from the treasurer's office [Rep. Tr. pp. 988, 1038-1039], accompanied by Myford Irvine, Miss Price, Mr. Hall and Charles S. Wheeler, Jr., the attorney for Mrs. Irvine, inventoried Mr. Irvine's safe deposit boxes [Ex. B-1; Rep. Tr. p. 1223]. There were three boxes in all, two at the Crocker Bank numbered 3550 and 4416 and one at the Wells Fargo Bank numbered 1412. The written inventory, which is titled Treasurer's Record Safe Deposit Examinations [Ex. B-1], was prepared by Mr. Cames in the vault as the boxes were opened and the contents examined [Rep. Tr. pp. 1226-1227]. It lists all of the contents of the boxes [Rep. Tr. pp. 1121-1122, 1232-1233]. The certificates representing the subject 510 shares of Irvine Company stock were not

found in the boxes [Ex. B-1; Rep. Tr. pp. 1232-1233, 1269-1270]. However, the certificates for the 12,750 shares of Moraga Company stock, which the Foundation had delivered to Mr. Irvine following the June 20, 1946 letter revoking the trust as to that stock, were found in Mr. Irvine's box number 4416 [Ex. B-1, p. 6] along with substantially all of the other stocks, bonds, notes and insurance policies owned by Mr. Irvine. The only Irvine Company stock certificates found in the boxes was the certificate for the 200 shares which Mr. Irvine held as trustee under the 1921 James Irvine, Jr. trust for the benefit of Athalie Irvine, the plaintiff in this action [Ex. B-1, p. 5].

The Irvine Company safe deposit box, which was No. 3867 at the Crocker Bank, was also opened and its contents were examined by Mr. Cames [Ex. B-1, p. 1; Rep. Tr. pp. 1234-1236]. There was no Irvine Company stock in the box [Rep. Tr. p. 1236]. The contents of the box were not listed in the inventory because it contained no property of Mr. Irvine and Mr. Cames was advised by the bank that Mr. Irvine had not signed the required signature card and had not had access to the box [Rep. Tr. pp. 1233-1235].

Mr. Hall having been present at the opening of all of the boxes and during the inventory of their contents by Mr. Cames [Rep. Tr. p. 1226], and having testified positively that the certificates representing the subject 510 shares of Irvine Company stock were not in the boxes [Rep. Tr. pp. 1236, 1240-1241], was questioned further by plaintiff's counsel in part as follows:

“Q. Where was the stock? Where was the 510 shares of stock? A. As I have told you, I never have seen those certificates, but my understand-

ing has always been and it must be the fact that they were in the possession of The Irvine Foundation, because *they were delivered to the president and secretary of The Foundation by Mr. Irvine*, so I don't see any reason why they should have parted with possession after once having obtained possession." (Emphasis added). [Rep. Tr. p. 1268].

* * * *

"Q. Is there any place in the other, any schedule or any estate tax paper that is in the estate tax file where you refer to the 510 shares of stock, as to its location when Mr. Irvine died, where you say it was? A. No. I am quite sure there is not. I shouldn't know of my own knowledge where it was.

Q. You didn't know? A. No. I assumed that it was in the—I knew that the legal title and title right to possession was in The Irvine Foundation, but where those certificates were physically present, I don't know whether it was in a box, a safe deposit owned by The Irvine Foundation, or the safe belonging to The Irvine Foundation, I don't know." [Rep. Tr. p. 1275].

The Foundation's safe deposit box was not opened and inventoried following Mr. Irvine's death [Ex. B-1; Rep. Tr. p. 1223] since Mr. Irvine was not a member, director or officer of the Foundation and had no right of access to the box at any time [Ex. A-14, p. 26; A-69].

On September 19, 1947, a special meeting of the directors of the Foundation was held and after commemorating Mr. Irvine's death, the following resolution was adopted:

“RESOLVED, that the President and Secretary of this corporation be and they hereby are authorized and directed to take all steps and to do and perform all things, for and on behalf of this corporation, that may be necessary to cause the certificates of the capital stock of The Irvine Company, *heretofore transferred to and now held by this corporation*, to be transferred on the books of The Irvine Company and new certificates representing such shares to be issued in the name of this corporation.” (Emphasis added). [Ex. A-14, p. 121].

Mr. Scarborough advised the directors at this meeting that before the Company could transfer the stock on its books, consents would have to be obtained from the Controller of the State of California and the Tax Commissioner of the State of West Virginia [Ex. B-3]. For the purpose of obtaining the needed consent from the West Virginia tax authority Mr. Scarborough, by letter dated October 9, 1947, forwarded an official application form to Myford Irvine and advised him as to the completion of the application in part as follows:

“Inasmuch as your father had long since transferred the legal title to the stock, *accompanied by delivery of the certificates*, to the Foundation, a negative answer to the first of the two questions set forth in the application would appear correct. . . .” (Emphasis added). [Ex. B-3].

After the consents were obtained [Exs. B-5, B-7] Miss Price, by letter dated November 7, 1947, sent certificates representing the 510 shares of stock of the Irvine Company “all in the name of James Irvine and all endorsed by him” together with the necessary

documentary stamps and the consents to the Irvine Company and requested that the shares be transferred into the name of the Foundation [Ex. D-2]. Miss Price wrote further under date of November 13, 1947, enclosing a copy of the Indenture of Trust, certified by her as secretary to be a true copy, and a copy of Mr. Irvine's letter to the Foundation dated June 20, 1946, with the explanation:

“Mr. Scarborough wrote Myford he thought it would be well to file with you a copy of the trust indenture regarding the 505 shares of The Irvine Company stock and a copy of Mr. Irvine's letter regarding the final five shares given.” [Ex. D-3].

The transfer of the stock on the books of the Company was accomplished by its secretary, Mr. Plum, on November 18, 1947 [Rep. Tr. pp. 2930-2932], and under cover of letter dated December 3, 1947, he forwarded to the Foundation a certificate representing 510 shares of Irvine Company stock issued in the name of the Foundation. [Ex. D-4; Rep. Tr. pp. 2928-2929].

In the Estate Tax Preliminary Notice, which was verified by Myford Irvine and filed under date of November 10, 1947, the 510 shares of Irvine Company stock are listed under the heading “Transfers During Decedent's Lifetime” with the following explanatory note: “These are the shares given the Foundation under instrument by which Mr. Irvine reserved dividends during life and also right to revoke gift or substitute other shares.” [Ex. B-9].

The Inheritance Tax Affidavit, which was subscribed and sworn to by Myford Irvine and filed on June 10, 1949, contains the following with respect to the subject 510 shares of Irvine Company stock: “By

revocable Indenture of Trust, dated *February 24, 1937*, decedent transferred and assigned to The James Irvine Foundation, a California corporation, trustee, (a) 505 shares of the capital stock of The Irvine Company, a West Virginia corporation; . . . (b) *June 20, 1946*, by letter, decedent added to the trust estate under the above trust five shares of The Irvine Company. . . ." [Ex. B-16, Sch. 3].

The Estate Tax Return, which was signed under oath by both Myford Irvine and Robert H. Gerdes on January 23, 1949, contains the same provisions [Ex. B-15, Sch. N] and a note referenced to the listing of the 510 shares as item number 78 on Schedule B of the return which states that the shares were transferred by decedent "prior to death" to a charitable corporation [Ex. B-15, Sch. B].

Mr. Young questioned Mr. Whitehead about Schedule B to the Estate Tax Return, in part as follows:

Q. Schedule B, 'Stocks and Bonds,' and included in Schedule B is an item 78 for 510 shares of The Irvine Company at \$11,000 per share. A. That's right.

Q. Did you review this schedule— A. Yes.

Q. At the time the estate tax was being prepared? A. Yes.

Q. And you saw this figure of \$5,600,000? A. Yes.

Q. Is that right? A. Yes.

Q. And you know at the time that the stock had been transferred during the lifetime of Mr. Irvine, is that right? A. Yes.

Q. Now there is a note over here, too, on the next page, Note 8. What does that say? A. Do you want me to read it?

Q. Yes. A. (Reading)

'These shares prior to death were transferred by decedent to a charitable corporation under the terms of a revocable trust (see Item 1 of Schedule N).''" (Emphasis added). [Rep. Tr. pp. 2902-2903].

The testimony and documents reviewed above establish beyond reasonable doubt that the certificates representing the shares of stock conveyed by the Indenture of Trust and Mr. Irvine's letter of June 20, 1946, were endorsed in blank and delivered to the Foundation by Mr. Irvine. Moreover, the evidence reviewed is uncontroverted and is not opposed by other evidence.

Plaintiff's argument that the certificates were not delivered is based in the main upon erroneous and wholly unsupported assertions regarding the exchange on April 21, 1941, of two certificates representing 173 of the 505 shares conveyed by the Indenture of Trust for seven new certificates representing the same shares. Plaintiff asserts:

"The substantial evidence is that on April 26, 1941 James Irvine was present at his home in Tustin, Orange County, California, and that on said date he attended a special meeting of the board of directors of The Irvine Company that was held at the office of the company near Tustin, California. It is therefore conclusive that James Irvine was present in person and personally surrendered certificates Nos. 33 and 42 to The Irvine Company on April 21, 1941, and personally received in lieu thereof the new certificates which were issued on the same date, to wit, April 21, 1941 [Ex. 2, Tr. 3647]. The fact that Mr. Irvine broke

certificates 33 and 42 into 7 new certificates in denominations as small as 5 and 10 shares on April 21, 1941, is substantial evidence that he never intended that the title to Irvine stock certificates 33 and 42 passed to The Irvine Foundation as trustee *in praesenti*. Furthermore, the possession by Mr. Irvine of certificates 33 and 42 on April 21, 1941, also supports the contention of the plaintiff that Mr. Irvine during his entire lifetime had the possession either personally or through his agent, E. M. Price, of all of said three certificates Nos. 28, 33 and 42 for the 505 shares of Irvine stock that are described in the indenture of trust." (App. Op. Br. pp. 14-15).

There is no evidence in the record to support plaintiff's conjecture that Mr. Irvine had certificates 33 and 42 in his possession or under his dominion or control or that it was Mr. Irvine who surrendered the certificates to the Company in 1941 in exchange for new certificates. This is pure speculation by the plaintiff for which there is no warrant in the evidence.

The fact is, as found by the District Court, that the record is silent as to the circumstances which surrounded the 1941 exchange of certificates [Clk. Tr. p. 167]. The only direct evidence regarding the exchange is the Company's stock record book, which contains the certificate stubs and the cancelled certificates [Ex. D-1]. This record discloses only that on April 21, 1941, certificates 33 for 132 shares and 42 for 41 shares, which were in the name of and endorsed in blank by Mr. Irvine, were cancelled in exchange for seven new certificates which were also issued in the name of Mr. Irvine and in turn endorsed by him in blank. The new

certificates, numbered 45, 46, 47, 48, 49, 50 and 51, representing the same 173 shares previously represented by certificates 33 and 42, were the certificates which were submitted by Miss Price in November 1947 for transfer on the books of the Company. They were accompanied by the original certificate 28 for 332 shares and certificates 34, 43, 44 and 53 for the last 5 shares transferred to the Foundation [Ex. D-2]. These certificates represented the total of the 510 shares which were conveyed to the Foundation by the Indenture of Trust and Mr. Irvine's letter of June 20, 1946. The shares were registered on the books of the Company in the name of the Foundation on November 18, 1947, and were thereafter represented by certificate 54 issued in the name of the Foundation [Ex. D-4; Rep. Tr. pp. 2930-2932].

When certificates 28, 33, and 42 were originally issued by the Company in 1909, 1923, and 1935, respectively, Mr. Irvine expressly acknowledged receipt of the certificates by signing the printed receipt on the stubs for those certificates [Ex. D-1]. However, the certificate stubs for the seven new certificates (Nos. 45, 46, 47, 48, 49, 50, and 51) that were issued in place of certificates 33 and 42 contain no such acknowledgment. The receipts printed on the stubs for the new certificates are unsigned. Accordingly, there is no evidence whatever as to the identity of the person who received custody of the new certificates when they were issued in exchange for certificates 33 and 42 on April 21, 1941.

Plaintiff argues that the stockholders' certificate record [Ex. 11] shows that Mr. Irvine personally surrendered certificates numbered 33 and 42 and personally received the new certificates issued in exchange, num-

bered 45, 46, 47, 48, 49, 50 and 51 (App. Op. Br. pp. 13-14). This is simply untrue. The record of Certificates Cancelled [Ex. 11, pp. 2, 4, 6, 8 and 10] contains a column titled "Left By" which is to indicate the name of the person who left the certificate for cancellation. With respect to the entries for cancellation of certificate 33 on page 4 and certificate 42 on page 6, the "Left By" column is not filled in, but is blank. The record of Certificates Issued [Ex. 11, pp. 3, 5, 7, 9 and 11] contains a column titled "Signature", which is to indicate the name of the person that received the certificate. With respect to the entries for the issuance of certificates numbered 45, 46, 47, 48, 49, 50 and 51 on pages 7 and 9, the "Signature" column is not filled in but is blank.

Myford Irvine and Miss Price, the officers of the Foundation who received and accepted delivery of all three certificates representing the 505 shares conveyed by the Indenture (as expressly appears in the minutes of the meetings of members and directors held on May 25, 1937 [Ex. A-14, pp. 28, 31]) may have made the 1941 exchange of certificates. Mr. Dinsmore, the other officer of the Foundation and the only other person who had access to its safe deposit box may have made the exchange. Or, any of the three Foundation officers may have given temporary custody of the certificates to Mr. Irvine for the purpose of making the change of certificates. However, no time need be wasted on this speculation since it is immaterial to the issues.

Under the express terms of the Indenture of Trust, the only way in which Mr. Irvine could divest the Foundation of its title to the shares and reacquire title in himself was "by written instrument filed with the

Trustee" [Ex. A-1, p. 2]. No such instrument was ever filed with the Foundation. Moreover, it is clear from the evidence reviewed above that Mr. Irvine had no desire or intention to reacquire title to the shares that he had previously conveyed to the Foundation. To the contrary, as expressed to Mr. Gerdes during preparation of Mr. Irvine's will in 1946, (more than five years after the exchange of certificates) Mr. Irvine had already transferred 505 shares and desired to also give his *last 5* shares to the Foundation [Rep. Tr. pp. 1812-1813]. The transfer of the additional five shares of Irvine Company stock was carried out at the same time and by the same "written instrument filed with the Trustee" by which Mr. Irvine revoked the trust as to the Moraga Company stock and reacquired title to those shares on June 20, 1946 [Ex. A-13].

Finally, as a matter of law, neither the possession of certificates 33 and 42 by Mr. Irvine in 1941, nor their exchange for new certificates by him, would have affected the title to the shares which was acquired by the Foundation in 1937 by Mr. Irvine's delivery of the certificates endorsed in blank and the formal acceptance of the delivery by the directors of the Foundation at their May 25, 1937 meeting. *Crane v. Reardon*, 217 Cal. 531, 20 P. 2d 49 (1933); *Hynes v. White*, 47 Cal. App. 549, 190 Pac. 836 (1920); *Coward v. DeCray*, 38 Cal. App. 290, 176 Pac. 56 (1918).

In the *Coward v. DeCray* case, Mrs. Wilkins owned certain shares of bank stock. She endorsed the certificates representing the stock to her niece and delivered them to her attorney, with instructions that he was to hold them until her (Mrs. Wilkins') death and then deliver them to the niece. Six weeks after this oc-

curred, Mrs. Wilkins obtained possession of the stock certificates from her attorney, had them reissued in her name and retained possession of the new certificates until her death. The niece, to whom the certificates had been endorsed, brought an action against the executrix of Mrs. Wilkins' estate to recover the stock. The trial court held that title to the stock had passed to the niece when the certificates were delivered to the attorney, and the executrix appealed. The California Court of Appeals affirmed the judgment holding, *inter alia*:

" . . . [T]he evidence shows that Mrs. Wilkins intended to make, and did make, an absolute gift *inter vivos* of the stock. She told her attorney that she wanted to give the stock to Mary, her niece, that she wanted her to have it at the time of her death, and that she wanted the delivery made so there would be no administration. Maher, the attorney, testified that he advised her that she could not avoid an administration of her estate unless she made an absolute delivery of the indorsed stock certificates during her lifetime, such delivery, to be either to Mary direct, or to Maher for her, with the understanding that the delivery must be beyond recall. She thereupon proceeded with the transaction and made the delivery to Maher for Mary, and directed him to give the certificates to Mary at the time of her (Mrs. Wilkins') death. The effect of such a delivery is to vest a present title in the grantee subject to a life interest in the grantor [citations omitted], and *no subsequent act of the grantor, such as a retaking of the certificates, can detract from the title which has already vested in the grantee.*" (Emphasis added).

38 Cal. App. at 292-293, 176 Pac. at 57.

We respectfully submit that the District Court did not err in finding that following the execution of the Indenture of Trust and letter of June 20, 1946, Mr. Irvine endorsed in blank the certificates described in those instruments and delivered them to the Foundation and that thereafter during the lifetime of Mr. Irvine the Foundation had in its possession certificates endorsed in blank representing the subject 510 shares of Irvine Company stock.

IV.

A Valid Inter Vivos Trust Was Established by the Indenture of Trust Dated February 24, 1937.

Under California law, a trust is created, as to the trustor, by any words or acts of the trustor indicating with reasonable certainty an intention on his part to create a trust and the subject, purpose and beneficiary of the trust. Calif. Civil Code § 2221. A trust is created as to the trustee by any words or acts of the trustee indicating, with reasonable certainty, an acceptance of the trust and the subject, purpose and beneficiary of the trust. Calif. Civil Code § 2222. The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission. Calif. Civil Code § 2251. When a trust is declared in writing all previous declarations of the trustor are merged therein. Calif. Civil Code § 2254.

The Indenture of Trust entered into between Mr. Irvine, as trustor, and the Foundation, as trustee, under date of February 24, 1937, indicates with complete certainty Mr. Irvine's intent to create a trust, the subject, purpose and beneficiaries of the trust, and its accept-

ance by the Foundation as trustee. Moreover, as discussed in parts II and III, *supra*, Mr. Irvine made a present transfer of the trust property, 510 shares of Irvine Company stock, to the Foundation by delivery of the Indenture of Trust and his letter of June 20, 1946, as well as by delivery of the certificates representing the shares endorsed in blank. All of the legal requirements for establishment of a trust under California law were thereby satisfied and the District Court held that a valid trust was established by the Indenture of Trust [Clk. Tr. p. 185].

Plaintiff in this Court, as in the District Court, contends that an *inter vivos* trust was not established by the Indenture of Trust, but that it was an ineffectual attempt to make a testamentary disposition of the subject stock and "created a mere agency" (App. Op. Br. p. 49). The District Court separately considered and rejected plaintiff's contentions, concluding: "It is the view and holding of this Court that the transfers of the stock were not testamentary in character." [Clk. Tr. p. 179] and "It is the view and holding of the Court that the contention of the plaintiff that the relationship of the Foundation to the shares of stock here in question was that of a mere agent is not well founded." [Clk. Tr. p. 183].

Plaintiff bases her claim that these findings are clearly erroneous on the fact that Mr. Irvine had the power to revoke the trust in whole or in part by a written instrument filed with the trustee and reserved to himself during his lifetime the right to receive the dividends, the right to vote the stock and the obligation to pay the taxes and expenses necessary to preserve and maintain the trust property. Plaintiff argues that the reservation of these life interests followed by

the provision that after the death of the trustor all dividends and other income and profits of the trust property were to be paid to the trustee and devoted to the uses and purposes of the trust shows that “no powers or duties whatever, nor any right, title or interest in The Irvine Company stock is given to the trustee until after the death of James Irvine” (App. Op. Br. p. 47).

Plaintiff’s argument is unsound in fact and as a matter of law. The Indenture begins by making a present and unrestricted transfer of title to the stock to the Foundation, as clearly appears from the words of the instrument:

“That the Trustor *hereby transfers, assigns and conveys* to the Trustee, to have and to hold in trust, nevertheless and for the following trust uses and purposes, the following securities, to-wit:

“—505—shares of the capital stock of The Irvine Company, . . .” (Emphasis added). [Ex. A-1, p. 1].

The subsequent reservation by the trustor of certain life interests in the stock and the power by a written instrument filed with the trustee to revoke the trust in no way affects the present transfer of ownership of the stock to the Foundation by the quoted grant. By the terms of the grant, the ownership of the stock vested immediately in the Foundation. The trustor’s reservation of the right to vote the stock and to receive the dividends only delayed the use and enjoyment of the property; it did not defer the transfer of ownership. Similarly, the reservation of the right to revoke the trust did no more than to give the trustor the power to divest the Foundation of its title at some future date.

This was the finding of the District Court and it is the only conclusion that reasonably can be drawn from the language of the Indenture and the testimony of the witnesses reviewed in parts II and III, *supra*; and it is mandatory under the established law of this state, *Tenant v. John Tennant Memorial Home*, 167 Cal. 570, 140 Pac. 242 (1914); *Nichols v. Emery*, 109 Cal. 323, 41 Pac. 1089 (1895); *Dingwell v. Seymour*, 91 Cal. App. 483, 267 Pac. 327 (1928).

As noted by the District Court the landmark case in this area of California law is *Nichols v. Emery*, cited *supra*. In that case the plaintiff's father, during his lifetime, conveyed to the plaintiff certain property in trust with the provision that within ten months after the death of the trustor the property was to be sold and the proceeds divided among his children in the manner specified in the trust deed. The power to revoke the trust was expressly reserved to the trustor, but no mode for exercising the power was prescribed in the trust instrument.

Plaintiff was unable to sell the property within ten months after the trustor's death and subsequently brought an action, joining the other beneficiaries as defendants, to obtain an order permitting him to sell the property after the time limit imposed by the trust instrument. The trial court concluded, as a matter of law, that the trust deed was testamentary in character and void for want of execution with the formalities prescribed for wills. This conclusion was based upon the court's finding:

“That it was not the intention of the said Walter E. Nichols when he executed the said instrument and delivered the same, nor of said Wal-

ter R. Nichols when he received the same, that said instrument should pass any immediate interest in said lands to said Walter R. Nichols, but it was intended that said Walter E. Nichols, the grantor in said deed, might use, possess, and occupy said lands and the products thereof during his life, and might make during his life any disposition of said lands that he might choose other and different from that determined upon in the said instrument, and said Walter E. Nichols did from the date of said instrument up to his death use and occupy said lands and take to himself the entire product thereof.' ”

109 Cal. at 327, 41 Pac. at 1090.

The California Supreme Court reversed the judgment on the grounds set forth in the following portion of the opinion:

“[T]o the creation of a valid express trust it is essential that some estate or interest should be conveyed to the trustee, and, when the instrument creating the trust is other than a will, that estate or interest must pass immediately. (Perry on Trusts, sec. 92.) By such a trust, therefore, something of the settler's estate has passed from him and into the trustee for the benefit of the *cestui*, and this transfer of interest is a present one and in no wise dependent upon the settler's death. *But it is important to note the distinction between the interest transferred and the enjoyment of that interest. The enjoyment of the cestui may be made to commence in the future and to depend for its commencement upon the termination of an existing life or lives or of an intermediate estate.* (Civ. Code sec. 707.)

“Did the grantor in the present case divest himself by the instrument of any part of the estate in the land which he had formerly owned and enjoyed? By the terms of the instrument an estate was assuredly conveyed to the trustee. The language is appropriate to a conveyance, and the grantor’s execution and delivery of the deed . . . operated to vest so much of his estate in the trustee as was necessary to carry out the purpose of the trust. . . . We have, therefore, an estate conveyed to a named trustee for named beneficiaries, for a legal purpose and a legal term, such a trust as conforms in all its essentials to the statutory requirements. *That no disposition is made by the trust of the interest and estate intervening in time and enjoyment between the dates of the deed and the death of the settler cannot affect the trust. The trustee takes the whole estate necessary for the purposes of the trust. All else remains in the grantor. (Civ. Code, sec. 866.) In this case there remained in the grantor the equivalent of a life estate during his own life, and he was thus entitled to remain in possession of the land, or lease it and retain the profits.*

“Nor did the fact that the settler reserved the power to revoke the trust operate to destroy it or change its character. He had the right to make the reservation (Civ. Code, sec. 2280), *but the trust remained operative and absolute until the right was exercised in proper mode. . . .*

“We think, however, that the circumstances of the reservation of power to revoke, and the limitation of the trust upon the life of the settler, have

operated to mislead the learned judge of the trial court. If the life selected had been that of a third person, and if no revocatory power had been reserved, no one would question but that a valid express trust had been created. But the fact that the designated life in being was the settler's could not operate to destroy its validity, for he had the right to select the life of any person as the measure of duration. And the fact that he reserved the right to revoke did not impair the trust, nor affect its character, since title and interest vested subject to divestiture only by revocation, and if no revocation was made, they became absolute.

“A man may desire to make disposition of his property in his lifetime to avoid administration of his estate after death. Indeed, in view of the fact, both patent and painful, that the fiercest and most expensive litigation, engendering the bitterest feeling, springs up over wills, such a desire is not unnatural. And when it is given legal expression, as by gifts absolute during life, or by gifts in trust during life, or voluntary settlements, *there is manifest, not only an absence of testamentary intent, but an absolute hostility to such intent.*” (Emphasis added.)

109 Cal. at 330-332, 41 Pac. at 1091-1092.

The California Supreme Court gave a definitive statement of the conditions that must exist before an instrument may be voided on the ground that it is testamentary in nature in its holding in *Tennant v. John Tennant Memorial Home*, cited *supra*, as follows:

“An instrument is declared to be testamentary in nature only when, and because, it appears from its

terms that the intention of the maker thereof was that it should not be operative as a conveyance or disposition of the property, or of any interest, present or future, therein, until his death. This is always essential. *If the instrument, according to its proper legal effect under the rules of conveyancing, passes at the time of its execution a present interest or title in the property to a third person, although it may be only an interest in a future estate and may be subject to defeat on the happening or nonoccurrence of a future event, it is a present conveyance and not a will.* We do not think the fact that if the grantor had not at that time made this deed, but instead had made her will giving this property to the respondent, she would then have continued to enjoy the property until her death, in the same manner and as fully as she did thereafter enjoy it by reason of her reservation in the deed of an estate therein during her life, constitutes a reason for holding the deed to be a testamentary disposition. *Notwithstanding these reservations and this privilege of enjoyment, she did then, in fact and in law, convey to the grantee the future estate which, at her death, became an estate in possession, to said grantee. The deed was not the same, in effect, as a will. It passed a present interest in the remainder, upon the contingency that the grantor should not, during her life, convey to another, or revoke the deed. The will would have had no such effect. The contingencies did not happen, hence the estate is now absolute.*" (Emphasis added).

167 Cal. at 579, 140 Pac. at 246-247.

The *Dingwell v. Seymour* case, cited *supra*, involved a contest between two sets of trustees claiming under competing trusts of the same property. The trustee, whose claim was based upon instruments subsequent in time, assailed the prior trust on the ground, among numerous others, that it was passive during the trustor's lifetime. The reservation in the trust instrument was as follows:

“‘It is expressly agreed and understood by and between the parties hereto that the party of the first part reserves to herself a life estate in and to all the property herein conveyed, and shall be entitled to the management thereof, and to the revenues arising therefrom, for the period of her natural life, and shall in like manner during said time be responsible for the care, maintenance and preservation of the same.’”

The trial court held the trust to be null and void. The California Court of Appeals held the trust to be valid and reversed the judgment, saying:

“We think that the argument of respondent is based on a false conception of the meaning and purpose of the life estate. In the first place, the life estate was never a part of the trust scheme. It is an estate authorized by the Civil Code and was by express terms in the instruments themselves carved out of and reserved from the properties—the trust *res*—conveyed to the trustee. By general provisions the trust was not to be put into operation during the lifetime of the trustor. *By her deeds she vested a present title in the trustee subject to the life estate and subject to the trust to be put into operation after her death. By her deeds*

Mrs. Olmsted conveyed to her trustees, to the appellants, a vested future interest in her properties described in said three deeds. (Secs. 693 and 694, Civ. Code.) In imposing upon herself the responsibility for the care, maintenance, and preservation of her properties, out of which she carved her life estate, she did nothing more than to express in words what the law implies as to the duties and responsibility of a life tenant. . . .”

91 Cal. App. at 500-501, 267 Pac. at 334.

The decisions in the foregoing cases are a complete answer to the plaintiff's argument that the Indenture of Trust was an invalid attempt to make a testamentary disposition of the subject stock and created a mere agency. That, of course, is not surprising, since Mr. Scarborough relied in part upon those very cases in drafting the Indenture of Trust and in advising Mr. Irvine in 1936 that it was legally sufficient to establish a valid *inter vivos* trust [Ex. A-17]. It will also be recalled that ten years later, in July of 1946, Mr. Sawyer relied upon one of the cases in advising Mr. Irvine:

“In our opinion the rule of *Nichols v. Emery* supra, is still followed to its letter and the trust is valid.” [Ex. A-57].

The opinions expressed by Messrs. Scarborough and Sawyer, a decade apart, were correct when they were written and they remain so to this day. *Gordon v. Barr*, 13 Cal. 2d 596, 91 P. 2d 101 (1939); *Hill v. Conover*, 191 Cal. App. 2d 171, 12 Cal. Rptr. 522 (1961); *Oakland Scavenger Co. v. Gandi*, 51 Cal. App. 2d 69, 124 P. 2d 143 (1942); *Randall v. Bank of America*, 48 Cal. App. 2d 249, 119 P. 2d 754 (1941).

The facts in the *Oakland Scavenger Co. v. Gandi* case, cited *supra*, make it worthy of special mention. The court there upheld as valid a trust in corporate stock established by a resolution adopted at a meeting of stockholders, as follows:

“‘RESOLVED: That each of the stockholders endorse and deliver to the Oakland Scavenger Company the Certificate of Stock owned by him, and that in case of the death of any stockholder the Oakland Scavenger Company, be and it is hereby authorized and directed to transfer said Certificate of Stock to the son of the deceased person, if in the opinion of the Board of Directors of said Oakland Scavenger Company, the said son is qualified and capable of assuming the vacancy created by the decease of the father, and if said deceased stockholder leaves no surviving son, or if the said son, in the opinion of the Board of Directors of the Oakland Scavenger Company be not qualified and capable of assuming said vacancy, then the Oakland Scavenger Company, be and it is hereby authorized and directed to sell the said Certificate of Stock, and the shares represented thereby, at the best price obtainable from a person qualified and capable of assuming said vacancy, delivering the money so received from such sale to the surviving wife of said deceased stockholder, or if he leaves no surviving wife, to his heirs at law.’”

51 Cal. App. 2d at 74, 124 P. 2d at 146.

One of the questions presented for decision was whether the endorsement and deposit of a certificate of stock with the corporation pursuant to the resolution

was effective to create a trust in the stock. In holding that a valid trust had been created, the court considered whether the transfer was testamentary in nature or amounted to a mere agency and rejected both possibilities, saying in part:

“In order to create a valid trust the transfer to the trustee need not be of a present interest, but may be of a future interest. All that is required is that an interest presently pass to the trustee. In *Tennant v. John Tennant Memorial Home, supra*, a grantor executed and delivered a deed absolute in which she reserved a life estate, power to revoke and power to sell. The court held that the same rules applied as to the case of a similar grant to a trustee, that an interest presently passed which saved the grant from being testamentary, notwithstanding the power of revocation and power of sale reserved. . . .”

51 Cal. App. 2d at 78, 124 P. 2d at 148.

The law of California, as established by the foregoing cases, is now also the law generally across the country. The Restatement of Trusts, upon which plaintiff relies, states the rule as follows:

“Where an interest in the trust property is created in a beneficiary other than the settlor, the disposition is not testamentary and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust.”

1 *Restatement of Trusts 2d*, § 57 at 151.

Plaintiff's brief contains a quotation of section 56 of the Restatement and comments a. and b. to that section (App. Op. Br., Appendix pp. 56-57), but omits comment f.:

"Postponement of enjoyment until settlor's death. If by the terms of the trust an interest passes to the beneficiary during the life of the settlor, although the interest does not take effect in enjoyment or possession before the death of the settlor, the trust is not a testamentary trust. See § 57. The disposition is not testamentary and the intended trust is valid, even though the interest of the beneficiary is contingent upon the existence of a certain state of facts at the time of the settlor's death."

1 *Restatement of Trusts* 2d, § 56 at 149.

Professor Scott, on whom plaintiff also relies (App. Op. Br. Appendix p. 57) commented on the decision in *National Shawmut Bank of Boston v. Joy*, 53 N.E. 2d 113 (Mass. 1944), which cited and followed *Nichols v. Emery*, cited *supra*, as follows:

"In other words, if the terms of the trust are clearly stated in the instrument, the disposition is not invalid as an unattested testamentary disposition merely because the settlor has reserved not only a life interest and a power of appointment and power to amend or revoke the trust, but also power to control the trustee in the exercise of its powers. In as much as the purpose of the Statute of Wills is to insure the carrying out of the considered wishes of the testator and to prevent fraudulent claims, it is believed that the decision is sound in emphasizing the definiteness in the ex-

pression of those wishes rather than making the validity of the disposition depend upon the mere question of the extent of the powers conferred upon the trustee. A well-drawn trust instrument is effective where it creates a trust *inter vivos*, even though the settlor reserves for himself during his lifetime power to control the trustee in the administration of the trust.”

1 Scott, *Trusts* § 57.2, at 453 (2d ed. 1956).

Professor Scott also explains the reason behind the rule:

“In determining whether an agency rather than a trust is created, consideration is given not merely to the extent of the powers reserved by the settlor, but also to the nature of the [dispositive] instrument, . . . The purpose of the Statute of Wills in requiring certain formalities is to prevent fraudulent claims. If the disposition is evidenced by a formal trust instrument, the danger of fraud is not increased by the fact that the settlor may have reserved extensive powers.”

1 Scott, *Trusts* § 57.2, at 52-53 (Supp. 1966).

It is readily discernible from the California cases reviewed above that a valid *inter vivos* trust is established even though the trustor reserves to himself for his lifetime all of the beneficial rights, powers and privileges incident to the trust property and conditions the beginning of the use and enjoyment of the trust property by the trustee and the beneficiary on the occurrence of his death. The decisions in those cases compel *a fortiori* the conclusion that the Indenture of Trust between Mr. Irvine and the Foundation established a valid *inter vivos* trust.

Mr. Irvine did not reserve to himself all of the proceeds of the trust property during his lifetime, as appears from the following provision of the Indenture:

“Any proceeds or profits from the corpus of the trust property (as distinguished from income thereof), which may accrue during the lifetime of the Trustor, and also all liquidating dividends and all other payments to the Trustor or the Trustee out of capital (whether of any corporation whose stock is held hereunder or of any other trust property hereunder) other than as hereinabove specifically reserved to the Trustor, shall be paid to and shall be invested by the Trustee in such property or securities as may be approved by the Trustor, and all rents, interest, dividends and other income of any such investments shall, during the lifetime of the Trustor, be paid to and belong to the Trustor as his sole and separate property.” [Ex. A-1, pp. 3-4].

The only trust proceeds and profits, other than income, reserved to Mr. Irvine were liquidating dividends and other withdrawals from or diminutions of capital which when paid would not constitute taxable income to him [Ex. A-1, p. 3]. Accordingly, during Mr. Irvine's lifetime the Foundation had the right to receive and the fiduciary obligation to obtain and invest all liquidating dividends, to the extent they exceeded Mr. Irvine's tax basis, and all capital gains distributions derived from the Irvine Company stock and, prior to June 20, 1946, the Moraga Company stock.

It should also be noted that the provision in the Indenture reserving to Mr. Irvine the right to revoke the trust by written instrument filed with the trustee does

not add to the power Mr. Irvine would have had without such a provision. California Civil Code § 2280, at all times since 1931 has provided, *inter alia*:

“Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. When a voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate. . . .”

Plaintiff misconstrues and distorts the provisions of the Indenture of Trust in numbered paragraphs 1, 2, 3, 4 and 5 on pages 6 and 7 to make the argument:

“It is therefore undisputed that there were no powers of any kind or any title to the Irvine Company stock vested in the trustee until after the death of the trustor. The reference that ‘after the death of the Trustor’ the trustee would be vested ‘with the following additional powers and discretions’ refer back to the first paragraph on page 4, which is hereinabove set forth and which is applicable to paragraphs 1, 2 and 3, pages 4 and 5, of the indenture of trust, as to the powers stated therein and which are to *become operative only after the death of the trustor.*” (App. Op. Br. p. 48).

These assertions are simply untrue. The Indenture expressly states that the matters set forth in numbered paragraphs 1-5 on pages 6 and 7 are “*additional powers and discretions*” (Emphasis added) [Ex. A-1, p. 6] and that the powers and discretions of the Trustee enumerated therein “*are not to be construed as a limitation* upon its general powers and discretions. . . .” (Emphasis added) [Ex. A-1, p. 7]. At no place in the Indenture are the general powers and discretions of the

Foundation as trustee in any way limited or restricted; nor does any provision of the Indenture relieve the Foundation of the obligations imposed upon it as trustee.

The powers, discretions and obligations of a trustee are conferred and imposed upon it by law and in California are specified, in part, in Civil Code §§ 2228-2239, 2258-2263 and 2267-2272. These statutes were recently applied by the Ninth Circuit Court of Appeals in upholding the validity of a trust under California law against the charge that it was a mere agency. *Dessar v. Bank of America National Trust & Savings Ass'n*, 353 F. 2d 468 (9th Cir. 1965).

The *Dessar* case involved a formal trust instrument that was made and was to be performed in California. Plaintiff sought to recover the trust property on the ground that the trust instrument only established an agency. The provisions on which plaintiff based this contention reserved to the trustor during her lifetime the right (a) to change or amend any of the provisions of the trust, (b) to increase or decrease the amount provided to be paid to any beneficiary, (c) to change the beneficiary or beneficiaries, (d) to revoke the trust in whole or in part, (e) to take out of the trust any part or all of the trust property, (f) to receive the income on the trust property, and (g) to direct the trustee with respect to the investment or other disposition of the trust property. A further paragraph of the trust instrument contained provisions that were applicable after the death of the trustor. They included (a) payment of the trustor's last illness and funeral expenses, (b) payment of inheritance and estate taxes, and (c) payments out of the corpus of the trust to various charities and relatives of the trustor.

The United States District Court for the Northern District of California, which had diversity jurisdiction, dismissed the action on the grounds that the plaintiff did not have capacity to bring the action and had failed to join indispensable parties. The Court of Appeals, with the consent of the parties, considered only the validity of the trust and affirmed the judgment, holding:

“Taken by its ‘four corners’ the instrument looks like a conveyance in trust and was obviously intended to be one. While extensive powers are retained by the trustor, they are not so broad as to make the relationship one of mere agency. For example, the trustee is not fully relieved of its very broad duties in relation to investment under Civil Code, Sections 2261 and 2262, or under the various sections of the Code imposing fiduciary duties, such as §§ 2259-2260, 2228-2238, 2269, or of its powers under §§ 2267-2272. It must follow the trustor’s written directions if given, and is protected by them. But we find nothing in the agreement relieving it of its duties when directions are not given. . . .

“We hold that the trust was, during the life of the trustor, a true trust, not a mere agency, and that the trust is valid. . . .”

353 F. 2d at 473-474.

The plaintiff spends considerable time nit-picking purported fact differences between the *Dessar* case and the case at bar in an unsuccessful effort to distinguish away the holding in the *Dessar* case (App. Op. Br. pp. 43-46). However, as the District Court correctly noted in its Memorandum opinion, “the control retained by

the trustor in the trust instrument in that case was as great if not greater than the control retained by the trustor in the present case." [Clk. Tr. p. 182]. Accordingly, the *Dessar* case is precedent for the holding in this case that the Indenture of Trust entered into by Mr. Irvine and the Foundation established not a mere agency, but a valid trust.

The District Court's finding that the relationship of the Foundation to the subject stock was that of a trustee of a valid trust and not that of an agent is also challenged by plaintiff on the basis of repetitive undocumented and unsupportable assertions that the Foundation was the *alter ego* and agent of Mr. Irvine and under his dominion and control and that the officers of the Foundation, Myford Irvine, Paul A. Dinsmore and Miss E. M. Price, were the "dummies" and "tools" of Mr. Irvine. Plaintiff argues:

"We have heretofore alluded to the fact that the Irvine Foundation and The Irvine Company were both *alter egos* of James Irvine. The Irvine Foundation was controlled and directed by Mr. Irvine to the same absolute degree that he controlled The Irvine Company during his entire lifetime. The directors of the Irvine Foundation Corporation and the officers thereof, to wit, his son Myford Irvine and his confidential secretary Miss E. M. Price, who were 'dummy' president and 'dummy' secretary-treasurer, and his employee Paul A. Dinsmore, who Mr. Irvine named as the 'dummy' vice president but who had no duties as such, all of whom were placed in their respective positions because they were the employees, agents and 'dummy' officers and directors of Mr. Irvine." (App. Op. Br. pp. 98-99).

There is no warrant in the evidence for the quoted assertions or those like them that are sprinkled throughout plaintiff's brief. They are pure make-believe, with no basis other than imagination and conjecture. The District Court expressly rejected the claim that Mr. Irvine had complete dominion over the Foundation on the ground that it "lacked evidentiary support" [Clk. Tr. p. 180] and found that Mr. Irvine *did not have* dominion over or control of the Foundation. In the words of the District Court's Memorandum opinion:

"James Irvine, in connection with the incorporation of the Foundation, designated those who were to constitute its first Board of Directors. The Directors constituted all of the members of the corporation. Under its articles of incorporation the Board of Directors selected their own successors in office, and hence the Board was self-perpetuating. James Irvine was at no time a member of the Board of Directors or an officer of the corporation. Two members of his family were on the first Board of Directors, but they constituted a minority of the Board. It was his expressed desire that the Foundation not be a family controlled Foundation. James Irvine reserved no power to designate the successors in office to the members of the first Board of Directors or to remove any Director from office. There is nothing in the articles of incorporation purporting to give James Irvine dominion over and control of the Foundation. The minutes of the Board of Directors and the minutes of the Foundation do not contain any reference to the presence of James Irvine at those meetings. However, it appears from the testimony that he did attend some of those meetings. The

record is silent as to the extent of his participation in the discussion and deliberation at those meetings. It seems clear that James Irvine did not have dominion over and control of the Foundation, the trustee under the indenture of trust." [Clk. Tr. pp. 180-181].

The total absence of evidentiary support also characterizes plaintiff's repeated assertions that the officers of the Foundation, Myford Irvine, Paul A. Dinsmore and Miss E. M. Price were the "dummies" and "tools" of Mr. Irvine. Each year for 22 consecutive years, from 1937 when the Foundation was first organized until his death in 1959, Myford Irvine was duly elected by the directors of the Foundation as its president. Paul A. Dinsmore was the duly elected vice-president of the Foundation from 1937 until his resignation as a member and director in 1950. Miss E. M. Price was duly elected as the secretary and treasurer of the Foundation each year from 1937 until her death in 1959 [Ex. A-14]. The fact that Myford Irvine and Miss Price for the first 10 of their 22 years of service to the Foundation were gainfully employed by Mr. Irvine and that Mr. Dinsmore during the period of his service to the Foundation was also an officer and director of The Irvine Company [Ex. 2] is no evidence at all that they were controlled or directed by Mr. Irvine in carrying out their fiduciary duties and obligations to the Foundation. Moreover, the record is barren of any evidence of an attempt to dominate or control the Foundation officers by Mr. Irvine. There is no evidence that he even made any suggestions or gave any directions to any of them in connection with their responsibilities as corporate officers of the Foundation.

The total lack of substance in plaintiff's assertions is demonstrated by the facts on which she relies for their support. Plaintiff argues:

"It further appears from the minutes of the meetings of the members and directors of the Foundation corporation that Myford Irvine, 'dummy' president, when sending communications to the directors also used the personal letterhead stationery of his father James Irvine, as evidenced by his letter dated April 17, 1945 [Ex. A-14, Tr. 3678]. The first notice sent by E. M. Price on the personal letterhead stationery of James Irvine was dated May 22, 1939, and the last notice sent by her, was dated on or about June 10, 1947, and gave notice of the regular annual meeting of the members for June 10, 1947. This is further substantial evidence that during the entire 10-year period of Mr. Irvine's lifetime the Irvine Foundation corporation was nothing more than his *alter ego*, and as such *alter ego* the officers and directors thereof, who were his agents and employees, and who were known in corporation law as 'dummies', were dominated and controlled absolutely by James Irvine." (App. Op. Br. p. 110).

All of the notices of meetings and letters to directors referred to in plaintiff's argument were signed by Myford Irvine as president or by Miss Price as secretary of the Foundation. The only inference that reasonably can be drawn from the fact that the communications were typed on Mr. Irvine's stationery is that Mr. Irvine made his paper supplies available to the Foundation. In doing so, Mr. Irvine certainly cannot be said to have been exercising dominion or control over the Foundation or its officers.

The balance of plaintiff's argument on this issue consists of incomplete summaries of various bits of testimony and argumentative assertions about it which are patently inaccurate and unsupportable. For example, plaintiff quotes selected segments of the testimony given by Richard C. O'Connor in support of her contentions that:

"The finding of fact of the District Court that Mr. O'Connor testified at the trial that he was of the view that the agency theory suggested by him in a letter dated August 6, 1949, was not well founded, is clearly erroneous [R. 180]." (App. Op. Br. p. 40).

And that:

"This finding is contrary to the testimony of Mr. O'Connor which is set forth in the appendix to appellant's brief." (App. Op. Br. p. 41).

The assertion that the District Court's finding is contrary to the testimony of Mr. O'Connor is an outright falsehood. It is true that the finding is not supported by the selected segments of testimony which plaintiff chose to include in the appendix to her brief; but that is only because plaintiff omitted from the appendix the testimony and writings [Ex. J-1, J-3] of Mr. O'Connor in which he expressed the view that the agency theory suggested in his letter of August 6, 1949, was not well founded. Mr. O'Connor testified:

"Q. Now, from this, the last entry here where you say Exhibit F, 'Trust for Foundation create mere agency,' question mark, and then in the handwriting note, does this refresh your recollection, Mr. O'Connor, that as of February 26, 1951, at the time of this conference with Mr. Hall and

Mr. Oliver, that the question as to the stock in the hands of The Foundation under the trust as mentioned in point fifth of your letter had not yet been resolved? A. No. It would indicate to me at least in my mind, it had been made up that *I was convinced that it was a valid trust.*" (Emphasis added). [Rep. Tr. p. 2647].

Mr. O'Connor also testified about the handwritten notes which he made on page 1 of Schedule 3 of the Inheritance Tax Affidavit in the margin adjacent to the statement of facts regarding the Foundation trust [Ex. J-1], in part, as follows:

"Q. In ink on the left-hand side in the margin, after this entry: 'To The James Irvine Foundation,' and approximately opposite the first paragraph, talking about the various provisions of the Indenture of Trust as to the reservation by the trustor, is some inked writing. Is that your writing? A. Yes. This is the paragraph that refers to the transfer of the 505 shares—

Q. That is correct. A. —to The Irvine Foundation.

Q. Yes, and the— A. I have a note opposite, in the left-hand margin, opposite that paragraph, handwritten by me:

'Is this a trust or mere agency which terminated at his death, property then passing to his estate? Extensive powers, et cetera, reserved, but title'—'title' underlined—'passed to trustee. *Believe trust.*'

Q. 'Believe trust,' is that right? A. Yes." (Emphasis added). [Rep. Tr. pp. 2703-04].

Handwritten notes which Mr. O'Connor made at and following his conference with attorneys for Mr. Irvine's estate on February 26, 1951 [Ex. J-3] were also the subject of testimony by Mr. O'Connor:

"Q. All right. Then what is written just below that? A. '*Foundation—agency?*' That is followed by an inked notation, '*No.*'

Q. And this inked notation, can you state when that was placed on the February 1951 notes? A. Sometime after the date, whenever that was, when the note itself was written.

Q. All right. In other words, it appears at this February 1951 conference or time, whenever that is, there appears to have been a conclusion reached with respect to the point fifth in your letter? A. That is right." (Emphasis added). [Rep. Tr. p. 2682].

Much of the testimony of Mr. O'Connor which is quoted in the appendix to plaintiff's brief relates to hypothetical and assumed facts posed by plaintiff's counsel on redirect examination about Mr. Irvine's transfer of the subject stock to the Foundation in trust (App. Op. Br., Appendix pp. 9-13). However, plaintiff omitted the testimony of Mr. O'Connor on cross-examination which gave rise to the hypothetical questions that were asked by plaintiff's counsel on redirect examination. It was, as follows:

"Q. At the time you wrote your letter of August 6, 1949 with respect to the point Fifth, the Foundation trust, had you done any independent legal research with respect to the validity of trusts in California or under California law unrelated to questions of taxes? A. Trusts in general?

Q. Yes, just a creation of inter vivos trusts under California Law. A. Yes. At that time I was teaching the subject of Trusts at the U.S.F. Law School at night, and had gone into the law from that aspect very thoroughly.

Q. Were you familiar—you were quite familiar with the law of California with respect to trusts, were you not? A. A lot more than I am right now.

* * * *

Q. The question was mentioned—there were some hypotheticals that were asked of you by Mr. Young about this stock and stock delivery. Did you recall reading the Indenture of Trust where it began:

‘Witness that the trustor hereby transfers, assigns, and conveys to the trustee to have and to hold in trust nevertheless and for the following trust uses and purposes the following securities, to wit, 505 shares of the capital of The Irvine Company’?

You recall reading that? A. Yes.

Q. What did that information convey to you with respect to the transfer of these 505 shares of stock? A. *This instrument, which is called an indenture of trust, was signed by Mr. James Irvine, Sr. as trustor, and I felt that under California law it would be sufficient in itself to give rise to the trust, whether shares were physically delivered or not, that the instrument—the delivery of this instrument to The Foundation would make the transfer valid.*” (Emphasis added). [Rep. Tr. pp. 2686-2688].

We respectfully submit that the District Court did not err in finding that a valid trust was established by the Indenture of Trust, that the transfers of the subject stock were not testamentary in character, and that the relationship of the Foundation to the subject stock was that of a trustee of a valid trust and not that of a mere agent.

V.

**The Indenture of Trust Dated February 24, 1937
Established a Valid Trust for Charitable Uses
and Purposes to Which the Rule Against Per-
petuities and the Laws Prohibiting the Suspen-
sion of the Powers of Alienation Do Not Apply.**

In California, charitable trusts are specifically exempted by the Constitution from the operation of rules against perpetuities. Article XX, Sec. 9, of the Constitution of California. This exemption in favor of charitable trusts extends also to laws prohibiting the suspension of the power of alienation. *Dingwell v. Seymour*, 91 Cal. App. 483, 267 Pac. 327 (1928); *Estate of O'Connor*, 158 Cal. App. 2d 187, 322 P. 2d 616 (1958); *Estate of McKenzie*, 227 Cal. App. 2d 167, 38 Cal. Rptr. 496 (1964).

The District Court found that the trust administered by the Foundation was “*a valid trust for charitable uses and purposes* under the California law exempting such trusts from the rule against perpetuities” (Emphasis added) [Clk. Tr. p. 174]. In making this finding, the District Court considered and rejected, as unsound in fact and law, all of the arguments that are made by the plaintiff in this Court, *i.e.*, that the trust is non-charitable because it excludes tax supported char-

ities from its benefits; it gives discretion to the trustee to add trust income to the capital of the trust; and it was established by Mr. Irvine for motives other than benefit to charity [Clk. Tr. pp. 169-174]. The findings and conclusions of the District Court are fully substantiated by the evidence and by the applicable authorities.

By statute in California all declarations of the trustor are deemed to be merged in the trust instrument. Calif. Civil Code §§ 2253, 2254; *National Bank v. Exchange Nat. Bank*, 186 Cal. 172, 199 Pac. 1 (1921); *Security First National Bank v. Wellslager*, 88 Cal. App. 2d 210, 218; 198 P. 2d 700 (1948). The Indenture of Trust sets forth in clear and unambiguous language the limitation that the trust property shall be used solely for charitable purposes. However, before reviewing the provisions of the Indenture, consideration should be given to the special rules of construction applicable to trusts in aid of charity under California law.

Gifts to charity are highly favored in the law of California and gifts in trust intended for charity must be liberally construed to uphold their validity whenever possible. *Estate of Tarrant*, 38 Cal. 2d 42, 237 P. 2d 505 (1951); *Dingwell v. Seymour*, 91 Cal. App. 483, 267 Pac. 327 (1928).

In the *Dingwell* case, the trust in issue was an *inter vivos* trust in which the trustor (like Mr. Irvine) had retained a life interest in the trust property. The court confirmed the validity of the trust and expressed the policy of liberal construction that applies to charitable trusts as follows:

“[A] few quotations from leading cases and authorities on the attitude of courts toward charitable trusts are pertinent, since they have a direct bear-

ing on the laws of construction. 'Charitable trusts are the favorites of equity; they are construed as valid whenever possible, by applying the most liberal rules of which the nature of the case admits, and are often upheld where private trusts would fail.' (11 C.J. 307.) We quote a sentence from the *Estate of Hinckley*, 58 Cal. 457: '. . . courts look with favor upon all attempted charitable donations and will endeavor to carry them into effect, if it can be done consistently with the rule of law. A bequest intended as a charity is not void, and there is no authority to construe it to be legally void, if it can possibly be made good.' Again, from the *Estate of Dwyer*, 159 Cal. 680 [115 Pac. 242]: 'It is well settled here that dispositions to charity are looked upon with favor and courts will uphold all such gifts whenever made by a donor in his lifetime or by a trustor, when it can be done consistently with the rules of law'; and from the *Estate of Upham*, 127 Cal. 90 [59 Pac. 315]: 'It must be remembered that charities—both as to trustees and the beneficiaries—are more liberally construed than gifts to individuals.' 'An interpretation which gives effect is preferred to one which makes void.' (Sec. 3541, Civ. Code.)."

91 Cal. App. at 507-508, 267 Pac. at 337.

While these special rules of construction are applicable to the trust established by Mr. Irvine, there is little need to apply them to determine whether the trust is a charitable trust. The Indenture of Trust expressly provides that the income from the trust property "shall be used, applied and devoted by the Trustee *exclusively to or for the advancement of any*

charitable use or purpose in the State of California as now is or may hereafter be authorized in the Articles of Incorporation of the Trustee and as the Board of Directors of the Trustee shall from time to time, in its discretion, select and determine; provided, however, that no part of the net income or earnings of the trust property shall inure to the benefit of any member of The James Irvine Foundation, Trustee, *nor shall any part thereof be used, applied or devoted to or for any other purpose than as hereinabove specified. . . .*" (Emphasis added) [Ex. A-1, p. 5]. The Indenture also specifies how the trustee shall accomplish the "exclusively" charitable purpose:

"Such income shall be used and applied by the Trustee, either by making donations or contributions to established charities exclusively engaged in the promotion of the purposes hereinabove mentioned, or by the establishment and/or support in whole or in part by the Trustee of charities devoted exclusively to the promotion of the same purposes, provided that all of such income shall not be devoted to any one or two charities to the exclusion of others." [Ex. A-1, pp. 5-6].

It is well established that a gift made simply to "charity" is sufficient to establish a valid charitable trust. There is no requirement that the trustor specify a particular object of his charity. *Estate of Bunn*, 33 Cal. 2d 897, 206 P. 2d 635 (1949); *Estate of Quinn*, 156 Cal. App. 2d 684, 320 P. 2d 219 (1958). That is substantially the procedure adopted by Mr. Irvine in the Indenture of Trust. He imposed the condition that the proceeds of the trust property be used "exclusively" for charitable purposes and not for any other purpose, but

left the selection of the particular charities to the discretion of the trustee.

In the succeeding provisions of the Indenture of Trust, suggestions are made to the Foundation by Mr. Irvine as to some general areas of charity in which he was interested. They read:

“The Trustor has no intention or desire to restrict the Trustee in its selection of the specific charities to be benefitted by this trust, nor to make any exclusive designation thereof. Nevertheless, the Trustor interprets the charitable purposes of The James Irvine Foundation as stated in its Articles of Incorporation to include financial aid generally to worthy individuals, who through illness or misfortune are temporarily in need. There is, for example, a very large body of selfrespecting citizens who are not wealthy enough to afford for their families and themselves that same high quality of medical and surgical and hospital care which is open to the wealthy and also the very poor. It is the desire and hope of the Trustor that The James Irvine Foundation may find a means of extending such temporary aid to as many as possible of these worthy individuals and families, and in so doing, that worthy citizens and families residing in Orange County, California, be not overlooked.

“The Trustor also suggests that a revolving fund be created for loans not to exceed in the aggregate One Thousand (\$1,000.00) Dollars per person, with very moderate rates of interest, to worthy students and scholars who are in need of financial aid to carry on their studies in institutions of learning in California, and also in moderate amounts to

scientists or individuals engaged in research work who require financial assistance therein." [Ex. A-1, pp. 9-10].

These, of course, are merely precatory provisions which do not affect the condition imposed in the previously quoted portion of the Indenture that the proceeds of the trust property must be used *exclusively for charitable purposes and for no other purpose*. However, the suggested uses are charitable purposes as appears from the following cases in which analogous provisions were held to be charitable:

Financial Assistance to Worthy Individuals: *Estate of Henderson*, 17 Cal. 2d 853, 112 P. 2d 605 (1941), (To the Eastern Star Home of California "to be used by the trustees in such manner as may be most beneficial to the Home and its inmates."); *Estate of Tarrant*, 38 Cal. 2d 42, 237 P. 2d 505 (1951), ("Pension Fund of the Great Northern Railway Company, a corporation, with head offices at St. Paul, Minnesota."); *Estate of Hood*, 57 Cal. App. 2d 782, 135 P. 2d 383 (1943), ("to have said moneys and property used by my said Trustees for such purposes as shall do the most good to charities or individuals who are in need of assistance.").

Medical, Hospital and Surgical Assistance: *Dingwell v. Seymour*, 91 Cal. App. 483, 267 Pac. 327 (1928), ("establish and maintain thereon a hospital for the care and treatment of the sick and wounded of both sexes. . .").

Needs of Citizens and Families of Orange County, California: *Estate of Robinson*, 63 Cal. 620 (1883), ("to the destitute women and children of the city of

San Francisco, California. . . ."); *Fay v. Howe*, 136 Cal. 599, 69 Pac. 423 (1902), ("the income to be used in aid of deserving aged native-born in the town of Southboro, Mass., needing such aid. . . ."); *Estate of Hood*, 57 Cal. App. 2d 782, 135 P. 2d 383 (1943), ("that in the spending . . . of the said sums . . . they use said moneys locally in and around the City of Fresno. . . .").

Education: *Collier v. Lindley*, 203 Cal. 641, 266 Pac. 526 (1928), ("To encourage and give educational opportunity for the study of . . ."); *Estate of Yule*, 57 Cal. App. 2d 652, 135 P. 2d 386 (1943), ("said aid to be furnished as aforesaid to girl and women students may be in the form of a gift or loan. . . .").

Research: *Estate of Rollins*, 163 Cal. App. 2d 225, 328 P. 2d 1005 (1958), ("to some charitable institution, or research fund"); *Estate of Moore*, 190 Cal. App. 2d 833, 12 Cal. Rptr. 436 (1961), ("to some creditable non profit Science investigation Society").

Where, as here, a trust is established with a corporation as trustee, the purposes in the corporation's articles of incorporation as well as provisions of the trust instrument may be applied to limit the trust to solely charitable uses. This principle was stated in *Brown v. Memorial Nat. Home Foundation*, 162 Cal. App. 2d 513, 329 P. 2d 118 (1958), as follows:

"Where a corporation becomes trustee of a benevolent trust the courts look first to its charter to determine the nature and extent of the dedication of its assets to eleemosynary purposes. [citation omitted.] 'Similarly, all the assets of a corporation organized solely for charitable purposes must be deemed to be impressed with a charitable trust

by virtue of the express declaration of the corporation's purposes. . . .’”

162 Cal. App. 2d at 520-521, 329 P. 2d at 122.

The Articles of Incorporation of the Foundation [Ex. A] impose a strict requirement that its assets be devoted exclusively to charitable purposes. They provide *inter alia*:

“Second: That this corporation is formed *solely for charitable purposes*, namely, public welfare, health, education, comfort, happiness and general well-being, particularly of the citizens and residents of the State of California, or any part thereof, and that this is a corporation which does not contemplate pecuniary gain or profit to the members thereof. (Emphasis added) [Ex. A, p. 1].

* * * * *

“Fifth: . . . This *is and shall always remain a charitable corporation*, and no member or director thereof shall ever have, own, or enjoy any personal property right or interest in or to any of the property of this corporation. (Emphasis added) [Ex. A, pp. 2-3].

* * * * *

“Seventh: These articles of incorporation and any provision or provisions thereof may be amended in any lawful manner, with affirmative vote or written consent of not less than six of the members of this corporation; provided, however, that never . . . shall the purposes of this corporation be changed or any of its property be diverted from the charitable uses and purposes for which this corporation is formed.” (Emphasis added) [Ex. A, p. 4].

The wholly charitable object and purpose of the trust established by Mr. Irvine through the Indenture of Trust and the incorporation of the Foundation to serve as the trustee is well summarized in the District Court's findings, as follows:

"In the indenture of trust it is stated that the purpose and object of the trust is to assist California charities. The same purpose and object is stated in the articles of incorporation of the Foundation. The incorporation of the Foundation and the execution of the indenture of trust with the Foundation as trustee are closely related. The manifest objective of James Irvine in incorporating the Foundation and in executing the indenture of trust was to make it possible for a substantial part of his property to be devoted to the assistance of California charities." [Clk. Tr. p. 172].

The provision in the Indenture of Trust excluding tax-supported charities as beneficiaries, which plaintiff contends has the effect of denying the trust the status of a charitable trust (Asserted Error No. 14; App. Op. Br. p. 28), reads in full:

"It is also the direction of the trustor that charities receiving the substantial part of their support from taxation should not be beneficiaries of any of the property derived from this trust, but that all such property, available from time to time for the benefit of charities, shall be used for such charities as do not enjoy any substantial support through taxation." [Ex. A-1, p. 10].

The limitation here, if indeed it is a limitation, is only as to the class of charities that may be benefitted by the trust. It is no different from limiting the beneficiaries to a particular school or hospital or to people of a particular age or sex. The cases, in California as elsewhere, are unanimous in upholding the validity of charitable trusts which specify that only particular charities or objects of charity are to benefit from the trust. In addition to the cases cited *supra*, see:

Estate of Hood, 57 Cal. App. 2d 782, 135 P. 2d 383 (1943), (“that such moneys shall not go to any organization which has an overhead to carry on, but shall go, as hereinbefore specified, where said moneys and all thereof can do the most direct good.”); *Estate of Purington*, 199 Cal. 661, 250 Pac. 657 (1926), (“to assist deserving women students at the University of California, who without such assistance might not be able to obtain the advantage of a college education.”); *Estate of Yule*, 57 Cal. App. 2d 652, 135 P. 2d 386 (1943), (gift to University of Washington to aid “girl and women students who are partially or wholly self-supporting and who are then attending the said University of Washington. . . .”); *Estate of DeMars*, 20 Cal. App. 2d 514, 67 P. 2d 374 (1937), (“Any amount left to go to the poor soldiers Letterman Hospital.”).

There are no cases which hold to the contrary and no authorities which could be cited to support plaintiff’s argument that the exclusion of tax-supported institutions from the class of charitable beneficiaries renders the trust non-charitable. The District Court rejected plaintiff’s argument, saying:

“It appears from the records of the Foundation over the years which were introduced into evidence

that there is no lack of California nontax supported organizations to whom the Foundation may properly make gifts. The records of the Foundation which are in evidence show a distribution of millions of dollars to innumerable California organizations.

“The plaintiff has cited no authority in support of her contention that exclusion of tax supported charities from the beneficiaries of a trust renders the trust a noncharitable trust. It would seem that it was the view of the trustor that nontax supported charities were more needful of support than were tax supported charities.

“It is the view and holding of the Court that the direction in the indenture of trust as to the exclusion of assistance to tax supported charities does not have the effect of denying the trust the status of a trust for charitable uses and purposes under the rule referred to.” [Clk. Tr. pp. 170-171].

Plaintiff also contends, without citation of a single authority in point, that paragraph 2 of the Indenture, which gives the trustee discretion to add income to the capital of the trust, renders the trust noncharitable (Asserted Error Nos. 13, 15-22, 25; App. Op. Br. pp. 27-35, 37). Plaintiff’s argument most clearly stated, is as follows:

“It is the theory of the plaintiff that paragraph 2 of the indenture of trust ‘*compels*’ the trustee to use all or any part of the balance of the trust income after the deductions enumerated in paragraph 1, for *investment purposes which are private and non-charitable* that renders the trust illegal and

void as such provision violates the law of perpetuities and the statutes against restraints on alienation of property. It is quite obvious therefore that the entire trust is bad and fails because it is illegal and void by reason of the power vested in the trustee for the non-charitable use of all or part of the income received from dividends on the Irvine stock which is the trust *res*, for investments, which thereupon *ipso facto* become part of the principal or corpus of the trust estate which can never be distributed for charitable purposes, as the trust is solely an income trust." (Emphasis added) (App. Op. Br. p. 29).

This argument is based on patent errors of both fact and law. The assertion that paragraph 2 of the Indenture "compels" the Foundation to invest income for "private and non-charitable" purposes is a clear misstatement of the provision. Paragraph 2 provides only that the Trustee *may* in its sound discretion add income to the trust property and requires that all income and profits from such additions are subject to the same restriction to charitable uses as the proceeds from the original trust property. Paragraph 2 reads in full:

"2. Out of the balance of said income, after the deductions hereinabove provided, *the Trustee may*, and in the judgment of the Trustor should, *each year set aside such sums as the Board of Directors of the Trustee shall in its sound discretion deem wise and expedient for investment*, and said Trustee shall invest the same in accordance with subparagraph 3 of the powers hereinafter enumerated, which said investment, when made, shall become part of the corpus or principal of the trust

property, and *the income and profits therefrom shall thereafter be used, applied and devoted as in this trust provided.*" (Emphasis added) [Ex. A-1, pp. 4-5].

This paragraph contains a provision which is routinely included in instruments establishing trusts that are to be perpetual to protect against the always present possibility that the value of the trust property may be so diminished that the trust cannot effectively serve the charitable purposes for which it was established. The plaintiff has taken the provision out of context and has ignored the plain meaning of the language to make the argument that paragraph 2 compels the trustee to add all of the income to the capital of the trust leaving nothing for distribution to charity. The District Court properly rejected this argument as being contrary to the facts, saying:

"It would hardly seem that James Irvine, after going to the work and effort to set up the Foundation and making it the trustee under the indenture of trust for the clearly expressed purpose and objective of assisting California charities, either intended or contemplated that under paragraph 2 in the indenture of trust the Directors of the Foundation could in their uncontrolled discretion defeat that purpose and objective by continually freezing all of the income into principal." [Clk. Tr. p. 174].

It seems too clear for argument that the Foundation could not assume the fiduciary obligations of a trustee to administer a trust for charitable purposes and then exercise a discretionary power to accumulate income

in such a way as to defeat the very purpose for which the trust was established. The charitable purposes of the trust are, of course, encompassed in the “sound discretion” which paragraph 2 requires the Foundation board of directors to exercise in deciding whether and to what extent income should be added to the trust capital. Within the discretion given in paragraph 2, income may be added to the capital of the trust only when and to the extent it would further, or assist in carrying out, the charitable purposes of the trust.

The District Court found the more “natural and reasonable construction” of the provision in paragraph 2 to be as stated in an excerpt quoted from the brief of the Attorney General of California, as follows:

“‘Reading the trust instrument as a whole, as we are required to do, it is clear that it cannot reasonably be interpreted as creating a trust for the purpose merely of enlarging the trust corpus. Rather, its *purpose* is the distribution of funds for charity. This being so, the power of the trustee to apply income to investments is necessarily circumscribed thereby.

“‘Powers of a trustee exist to carry out the trust objective. They may not be exercised independently and in opposition to the purpose of the trust. They are subordinate to the purpose of the trust and must be exercised in a manner that will further that purpose. * * *’” [Clk. Tr. p. 173].

This finding is unquestionably correct. Calif. Civil Code § 1641; *Pacific Home v. County of Los Angeles*, 41 Cal. 2d 844, 850, 264 P. 2d 539 (1953); *Estate of Miller*, 230 Cal. App. 2d 888, 907, 41 Cal.

Rptr. 410 (1964); *House of Rest v. County of Los Angeles*, 151 Cal. App. 2d 523, 528, 312 P. 2d 392 (1957). And, it is the only finding that properly could be made under the special rules of construction applicable to charitable trusts which are reviewed hereinabove.

However, even under the plaintiff's baseless and untenable construction of paragraph 2, the validity of the trust is in no way impaired. The plaintiff has made a gross error in asserting that a provision for the addition of income to the capital of the trust "renders the trust illegal and void as such provision violates the law of perpetuities and the statutes against restraints on alienation of property." Not a single authority has been cited by plaintiff which either holds or contains dictum in support of her assertion. This is because it is a matter of settled law in California and elsewhere in the United States that such provisions are not subject to rules against perpetuities and restraints on alienation and that such provisions, whether valid or invalid, *do not affect the existence or validity of charitable trusts*.

While not so acknowledged by plaintiff, paragraph 2 is an ordinary provision for accumulations:

"Where the rents, dividends or other income is treated by the trustee as capital, and he invests it, makes a new capital of the income derived therefrom, and invests that, and so on, such capital and accrued income constitute 'accumulations'."

Estate of Steele, 124 Cal. 533, 541, 57 Pac. 564, 567 (1899).

Accumulation provisions, whether discretionary as in the Indenture of Trust, or mandatory, do not affect

the charitable nature of the trust or its validity as a charitable trust. The income that is invested becomes a part of the trust property and is subject to the same restriction to charitable uses as the original capital. Moreover, accumulation provisions are not subject to rules against perpetuities and restraints on alienation. Rather, they are subject to judicial supervision. If the trust instrument requires accumulations that are unreasonable or if a trustee that has discretion to accumulate does so to an unreasonable extent, the court may order the distribution of the income or otherwise restrict the amount of the accumulation.

In no event does a provision authorizing or directing the accumulation of income as an addition to the trust property operate to invalidate the trust. In *Estate of McKenzie*, 227 Cal. App. 2d 167, 38 Cal. Rptr. 496 (1964), the California Court of Appeals so held with the succinct statement that accumulations in charitable trusts are subject to judicial supervision and do not affect "the *existence* or the *validity* of the trust itself." (Emphasis added).

In the early case of *Duggan v. Slocum*, 92 Fed. 806 (2d Cir. 1899), the trust provisions directed the trustee to invest the trust income in securities "for a term of ten years *or more*, at the discretion of my said executors." The court held that since the trust was limited to charitable uses and was therefore exempt from the rule against perpetuities, the accumulations were likewise exempt. With respect to the discretionary power of the trustees to extend the period of the accumulation indefinitely, the court stated:

"It is possible that they will use their discretion to an extent which will not be satisfactory to the

people who may become interested in the establishment of the charities, but a plainly indiscreet exercise of their discretion is within the control of a court of equity, and would be corrected. Story, Eq. Jur. § 1191." 92 Fed. at 810.

An excellent summary of the authorities applicable to accumulation provisions in charitable trusts is found in *Wendell v. Hazel Wood Cemetery*, 67 A. 2d 219 (N.J. 1949), *aff'd*, 72 A. 2d 383 (1950), where the court upheld a direction to the trustee "to add any surplus there may be to the principal of the trust fund":

"Where there is an immediate vesting of a trust fund, for charitable purposes, a will is not void because it directs or permits accumulations for an unspecified period of time. *Conway v. Third Nat. Bank & Trust Co. of Camden*, 118 N.J. Eq. 61, 177 A. 113, affirmed 119 N.J. Eq. 575, 182 A. 916. This decision should set at rest any question touching the validity of this direction for accumulations. See, also, Page on Wills, p. 676, Sec. 1256, and Gray on Perpetuities (4th Ed.), p. 630, par. 678, where the text reads as follows: 'Where there is an unconditional gift to charity, the gift will be regarded as immediate and good, although the particular mode of carrying out the charity which the donor has indicated is too remote. Consequently in such a case if a direction for accumulation is invalid the only result is that the income is immediately distributable in charity; *the heirs or next of kin are not let in.*' (Italics mine). And, at page 633, par. 679: 'If the purpose of the trust cannot be carried out without accumulation for too long a period, the fund may be applied cy pres.'

“Citing *Conway v. Third Nat. Bank & Trust Co. of Camden*, *supra*. See, also, *Restatement, Trusts*, par. 401, Comment L, which reads as follows: ‘In the absence of a statute otherwise providing, a direction to accumulate the income of property held upon a charitable trust is valid, although the period of accumulation is longer than the period of the rule against perpetuities’. And in 3 *Scott on Trusts*, sec. 401.9, p. 2142, the text reads as follows:

“ ‘Where property is given upon an unconditional trust for charitable purposes but it is provided that the income shall be accumulated for a certain time, the American courts have generally held that the provision for accumulation is binding unless under all the circumstances the period of accumulation is unreasonably long. The fact that the period is longer than lives in being and twenty-one years does not necessarily invalidate the provision.

“ ‘If there is an unconditional gift for charitable purposes, the gift does not fail although it is provided by the terms of the trust that the income shall be accumulated for a period longer than that of the rule against perpetuities. If the direction for accumulation is valid, it will be enforced. If the provision for accumulation is invalid, it will be disregarded and the court will direct the immediate application of the property to the designated charitable purposes. This is in accordance with the general principle underlying the *cy pres* doctrine,
* * *’

“See, also, 41 Am.Jur., p. 93, sec. 48; 48 C.J. 990, Sec. 80.

“In the light of these authorities it must be concluded that the direction for accumulation here is valid. If some time in the future the accumulations should appear to a court of competent jurisdiction to be unreasonable, the accumulations might be ordered distributed to the named beneficiaries immediately or *cy pres*. But to paraphrase the language of Mr. Justice Heher in *Conway v. Third Nat. Bank & Trust Co. of Camden*, *supra*, ‘There is no present necessity for determining this question; it may be settled when it arises, if it ever does arise.’ In any event ‘the heirs or next of kin are not let in.’ *Gray on Perpetuities*, *supra*, par. 678.”

67 A. 2d at 224.

There are innumerable cases in which charitable trusts subject to mandatory provisions for the accumulation of income have been upheld as valid even though the required period of accumulation extended well beyond the period permitted by the applicable rules against perpetuities and restraints on alienation. A few examples are: *Penick v. Bank of Wadesboro*, 12 S.E. 2d 253 (N.C. 1940); *Schreiner v. Cincinnati Altenheim*, 22 N.E. 2d 587 (Ohio 1939); *Frazier v. Merchants National Bank of Salem*, 5 N.E. 2d 550 (Mass. 1936); *Reasoner v. Herman*, 134 N.E. 276 (Ind. 1922); and *Boston v. Doyle*, 68 N.E. 851 (Mass. 1903).

The conclusion reached by the court in *Reasoner v. Herman* typifies the holdings in the cases:

“Appellees talk of this accumulation as going through the ages until it becomes a public menace.

There is no occasion for alarm; for this may be limited by a court of equity, so that it will not be a public menace, and so that it will best subserve the main purpose, charity." 134 N.E. at 280-281.

Under California law the Attorney General is and always has been charged with the supervision of the administration of charitable trusts. See *People v. Cogswell*, 113 Cal. 129, 45 Pac. 270 (1896); *Brown v. Memorial Nat. Home Foundation*, 162 Cal. App. 2d 513, 329 P. 2d 118 (1958); Calif. Government Code, §§ 12580-12596 (The Uniform Supervision of Trustees for Charitable Purposes Act); and Calif. Corporations Code §§ 9505, 10207. The administration of accumulation provisions is specifically referred to in section 10207 of the Corporations Code (based on former Civil Code § 606 as enacted in 1927 and amended in 1929). It provides:

"Examination by Attorney General: Institution of proceedings: Restriction on accumulation of income. Each such corporation shall be subject at all times to examination by the Attorney General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may depart from the general purpose for which it is formed. In case of any such failure or departure the Attorney General shall institute, in the name of the State, the proceedings necessary to correct the non-compliance or departure. Except as specially approved by the Attorney General such a corporation shall not accumulate income for a period longer than five years."

The District Court properly concluded from the statutory provisions referred to above, that the Attorney General has the duty to and can always obtain the necessary judicial supervision to prevent the Foundation from exercising its discretion under the accumulation provision in the Indenture of Trust in such a way as to depart from the charitable objects and purposes of the trust [Clk. Tr. p. 173].

Plaintiff's unsupported assertion that the accumulation provision in the Indenture of Trust renders it "illegal and void" (App. Op. Br. p. 29), is erroneous under California law even with respect to private trusts. Calif. Civil Code, § 725; *In re Yates Estate*, 170 Cal. 254, 149 Pac. 555 (1915). Civil Code section 725 provides:

"If the direction for an accumulation of the income of property is for a longer term than is limited in the last section, the *direction only, whether separable or not* from the other provisions of the instrument, is void as respects the time beyond the limit prescribed in said last section, and *no other part of such instrument is affected* by the void portion of such direction." (Emphasis added).

Under this statute, even private trusts which are subject to rules against perpetuities and restraints on alienation, are not rendered invalid or void by a provision permitting the trustees in their discretion to accumulate income indefinitely. Clearly, then, trusts limited to charitable uses which are exempt from rules against perpetuities and restraints on alienation are not invalidated or voided by such a provision and *Estate of McKenzie*, 227 Cal. App. 2d 167, 38 Cal. Rptr. 496 (1964) so holds.

Plaintiff's reliance on *Estate of Sutro*, 155 Cal. 727, 102 Pac. 920 (1909); *Estate of Kline*, 138 Cal. App. 514, 32 P. 2d 677 (1934); *Estate of Peabody*, 21 Cal. App. 2d 690, 70 P. 2d 249 (1937); *Estate of Vance*, 118 Cal. App. 163, 4 P. 2d 977 (1931); *Grigson v. Harding*, 144 A. 2d 870 (Maine 1958); and *Goetz v. Old Nat. Bk. of Martinsburg, W. Va.*, 84 S.E. 2d 759 (W. Va. 1954), to support her contention that the accumulation provision in the Indenture of Trust renders it illegal and void (App. Op. Br. pp. 34, 63-64), is badly misplaced. Those cases do not deal with, nor even discuss, the question of accumulation of income in charitable trusts. Rather, the issue before the court in each case was whether the trustee was required by the terms of the trust instrument to limit the beneficiaries of the trust to solely charitable organizations and causes.

In *Estate of Sutro*, cited *supra*, trust provisions contained in a will included the direction that the trustees apply the proceeds "to the uses and purposes, charitable, educational *and other*, which are, in this will, provided and specified." The court found that there was nothing in the will to show that the "*other*" uses referred to were limited to charitable uses and that the trustee could select non-charitable enterprises as beneficiaries of the trust without violating the terms of the will.

In *Estate of Kline*, cited *supra*, a will contained a trust provision directing that, "all of the rest and remaining income received and derived from the trust estate . . . shall go and be paid, used and/or disbursed by my said Trustee to such *persons, charitable organizations and/or corporations* . . . selected by my said trustee in its absolute and uncontrolled discretion." The court found that the word "*persons*" and the phrase

“and/or corporations” were not limited to charitable causes and enterprises, and thus the trustee, without violating the terms of the trust, could disburse the proceeds of the trust to non-charitable uses.

In *Estate of Peabody*, cited *supra*, the residuary clause of decedent’s will provided for “the balance of the estate to be liquidated then to go to *an institution for old people* in memory of my beloved Mother and Father, Mr. J. Haskell is to make the choice of the institution.” The court found that under this provision the trustee could nominate an institution that was run for profit as the beneficiary and therefore the trust was not limited to charitable uses.

In *Estate of Vance*, cited *supra*, the will directed that the residue of the estate be given in trust “. . . to be invested in Bibles, to be distributed in home and foreign lands in such quantities and in such places as may to my said executors seem best.” The court held that under this direction the Bibles could be distributed for profit without violating the terms of the will and, therefore, that the trust was not limited to charitable uses.

In *Grigson v. Harding*, cited *supra*, the only direction given as to the ultimate disposition of decedent’s property was that “after the disposition of the laboratory by my trustees, I direct that my other estate shall be turned over to the trustees, organizations or persons having the care of the laboratory, and the income used to aid in its upkeep and maintenance.” The Maine court found that the organizations that might have the care of the laboratory were not limited to charitable organizations and, accordingly, that the trust proceeds could be distributed for the benefit of enterprises engaged in business for profit.

Finally, in *Goetz v. Old Nat. Bk. of Martinsburg*, cited *supra*, a decedent bequeathed the residue of her estate in trust "to distribute and pay over the same unto such religious, charitable, scientific, literary, educational, or fraternal corporations and associations, as they may, in their discretion select and determine. . . ." The West Virginia court held that the attempted trust for religious purposes did not comply with the statutes of that State requiring the naming of religious organizations as trust beneficiaries and that the trustees could select non-charitable scientific, literary or educational organizations as beneficiaries of the trust without violating the provisions of the will.

The foregoing cases clearly do not support plaintiff's assertions that the accumulation provision in the Indenture of Trust renders the trust illegal and void; nor do the cases have any other application to the case at bar. Here, the provisions of the Indenture of Trust as well as the Foundation's Articles of Incorporation in direct and mandatory language limit the beneficiaries of the trust to charities and require that the proceeds of the trust property "be used, applied and devoted by the trustee *exclusively* to or for the advancement of any charitable use or purpose in the State of California." In the light of the plain meaning of the words used in those documents there can be no doubt that the trust established by Mr. Irvine is limited to charitable uses and purposes and is therefore exempt from the operation of rules against perpetuities and restraints on alienation. Constitution of California, Article XX, Section 9.

Plaintiff also contends that the trust is not charitable on the ground that the accumulation provision in para-

graph 2 of the Indenture of Trust shows that Mr. Irvine had a motive other than benefit to charity in establishing the trust (App. Op. Br. pp. 32, 80). There is no merit in this contention.

It cannot be expected that anyone establishing a trust that is to be perpetual can foresee what the value of the trust property may become or the amount of capital that may be required in the future to serve effectively the charitable needs for which the trust was established. The only reasonable inference that can be drawn from the inclusion of a provision in the Indenture of Trust permitting the trustee, in its discretion, to accumulate income is that Mr. Irvine desired to provide the trustee with the flexibility to increase the size of the trust fund if the trustee should determine that such an increase was necessary to carry out the charitable purposes of the trust; and this was the finding of

However, no time need be devoted to a determination of Mr. Irvine's motives in establishing the subject trust. Under California law, whether the trust is charitable must be determined by the uses and purposes to which the proceeds of the trust property may be applied rather than by the trustor's motive in establishing the trust. *Estate of Robbins*, 57 Cal. 2d 718, 21 Cal. Rptr. 797 (1962); *Davenport v. Davenport Foundation*, 36 Cal. 2d 67, 222 P. 2d 11 (1950).

In *Estate of Robbins*, an heir challenged the validity of a trust on the ground that it was non-charitable and therefore invalid because the testator's motive in establishing the trust was to encourage the commission of political crimes. The California Supreme Court as the District Court.

sumed, for purposes of its decision, that the testator's motive in establishing the trust was as contended by the heir, but held that his intent or motive for making the gift in trust for charity was immaterial. In the words of the court:

“It is the purpose for which the property is to be used, however, not the motives of the testator that determines whether a trust is a valid charitable trust.”

57 Cal. 2d at 724, 21 Cal. Rptr. at 800.

Fully recognizing the binding effect of this decision by the California Supreme Court that the motive of the trustor is immaterial in determining whether a trust is charitable, we cannot pass without noting that Mr. Irvine's interest in benefitting the objects of charity in this State through the trust administered by the Foundation is clearly established in the record of this case [*See, e.g.*, Rep. Tr. pp. 1810-1811, 3518-3519].

Plaintiff also argues that the District Court erred in considering the Foundation's Articles of Incorporation as well as the Indenture of Trust in determining that the subject trust is limited to charitable uses and purposes (Asserted Error Nos. 16, 17, 18, 19, App. Op. Br. pp. 29-32). The District Court's consideration of the Articles of Incorporation was, of course, entirely appropriate since the trust was established by the Indenture of Trust under the management of the Foundation, as trustee. *Brown v. Memorial Nat. Home Foundation*, 162 Cal. App. 2d 513, 329 P. 2d 118 (1958). The Dis-

strict Court quoted the governing rule from the opinion in the *Brown* case as follows:

“Where a corporation becomes trustee of a benevolent trust the courts look first to its character to determine the nature and extent of the dedication of its assets to eleemosynary purposes * * *.”
[Clk. Tr. p. 172]

The case of *Davenport v. Davenport Foundation*, 36 Cal. 2d 67, 222 P. 2d 11 (1950), which is the sole authority upon which plaintiff relies to support her contention that the District Court erred in not limiting its consideration to the Indenture of Trust, is not in point. As appears from the opinion of the Supreme Court and the prior opinion of the District Court of Appeal (215 P. 2d 467 (1950)) the issue raised by plaintiff's contention was not before the court in that case; nor was it ever discussed or even mentioned in the opinions. Unlike the trusts in the *Brown* case and in the case at bar, the management, control and direction of the trust in the *Davenport* case was not committed to a corporation, but to a group of five individuals who were designated as a board of trustees. Under the trust instrument, legal title to the trust property was conveyed to LaVerne College, but its authority was specifically limited to whatever ministerial acts were necessary to carry out the orders and directions of the individual trustees. It was more than a year after the establishment of the trust that the trustees caused the Davenport Foundation to be incorporated and even then the powers given by the trust instrument to the individuals serving

as a board of trustees continued as before. Accordingly, the provisions of the Articles of Incorporation of the Davenport Foundation were not before the court and it had no occasion or reason to consider them.

To the extent that the plaintiff's other assertions and arguments on this issue may warrant any discussion, they are ably reviewed in the brief of defendant Thomas C. Lynch, Attorney General of the State of California, and, in the interest of conserving the time of the Court and Counsel, we adopt the arguments set forth in the Attorney General's brief as to the matters which are not discussed hereinabove.

We respectfully submit that the District Court did not err in finding that the Indenture of Trust dated February 24, 1937, established a valid trust for charitable uses and purposes to which the rules against perpetuities and restraints on alienation do not apply.

VI.

The District Court Did Not Err in Denying Plaintiff's Request That the Court Take Judicial Notice of a Compilation of Letters, Newspaper Articles and Other Data Transmitted to the Members of a Legislative Subcommittee by Its Chairman.

The plaintiff has filed with this Court a volume entitled "Subcommittee Chairman's Report to Subcommittee No. I Select Committee on Small Business" [Clk. Tr. p. 221]. This same volume was submitted to the District Court as a purported appendix to plaintiff's *closing* post trial brief under the guise that its contents were subject to judicial notice. The District Court, on motion of the Foundation, properly denied plaintiff's request that judicial notice be taken of the volume and its contents [Clk Tr. p. 135].

Plaintiff cites no authority in support of her unilateral attempt to inject this compilation of inadmissible materials into the record. Plaintiff offers only the unsupported generalization that the District Court was required to take judicial notice of the volume and its contents (App. Op. Br. p. 8). The plaintiff is in error in this assertion. Judicial notice cannot be used to augment the record with writings which contain inadmissible hearsay and opinions, and for which there has been no foundation or authentication. *Alvary v. United States*, 302 F. 2d 790, 794 (2nd Cir. 1962).

The subject volume contains 1130 pages of copies of records, newspaper clippings, letters, and summaries of data collected by a legislative subcommittee in connection with its continuing study of the impact of tax-exempt foundations and charitable trusts on the Nation's economy, and a letter of transmittal from the chairman of the subcommittee to its members. Compilations of such documents are not subject to judicial notice and are not otherwise admissible as evidence. It is only "official acts of the legislative, executive and judicial departments of the United States," that may be judicially noticed. Calif. Evidence Code § 452(c). There is no statute or case law which permits judicial notice of correspondence between the chairman and members of a legislative subcommittee or of the letters, newspaper clippings and other records and data collected by the subcommittee. *Olender v. United States*, 210 F. 2d 795 (9th Cir. 1954), *Love v. Wolf*, 226 Cal. App. 2d 378, 38 Cal. Rptr. 183 (1964).

In *Olender v. United States*, the issue, as in this case, was whether a file of an official government agency, which included documents obtained from private sources together with documents prepared by officials

of the agency, could be considered by the trier of fact. This Court held in that case that the file was inadmissible and that the trial court erred in receiving it in evidence.

We respectfully submit that the District Court did not err in denying plaintiff's request that it take judicial notice of the referenced volume.

Conclusion.

The plaintiff, whose wealth accrues from the benevolence of her grandfather and his concern to provide for his family, has by this action attempted to thwart his concern also for the objects of charity among the people of California. The "assistance of California charities", which the District Court found to be the "manifest objective of James Irvine" in establishing a perpetual trust, has been a reality for more than 30 years.

"In fulfilling its obligations under this trust, the foundation has quietly and without publicity granted major sums for capital improvements to almost every private university within the State of California and to a large number of hospitals in the Orange County and San Francisco Bay regions. . . . Perhaps by these grants the Irvine name will engender its most precious light and warmth."

Cleland, *The Irvine Ranch*, 146-147 (1962)
[Ex. E-9].

Plaintiff's superficial claims that the trust is invalid were not established by evidence in the District Court. Accordingly, in this Court, plaintiff has been able to rely only upon wishful embellishments of the evidence

and an assiduous presentation of suppositions and conjectures to support her contention that the District Court's findings are "clearly erroneous".

We respectfully submit that the findings of the District Court are fully supported by the evidence in the record and that its Judgment should be affirmed, with costs to the appellees.

Respectfully submitted,

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ATHALIE IRVINE SMITH,

Appellant,

vs.

THE JAMES IRVINE FOUNDATION,
a corporation, et al.,

Appellees.

**Appeal From the United States District Court
Central District of California**

BRIEF FOR APPELLEES

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Gloria Wood Irvine and Security
Pacific National Bank, as Execu-
tors and Trustees of the Estate
of Myford Irvine, Deceased.

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No. 22607

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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Appellant,

vs.

THE JAMES IRVINE FOUNDATION,
a corporation, et al.,

Appellees.

Appeal From the United States District Court
Central District of California

BRIEF FOR APPELLEES

JURISDICTIONAL STATEMENT

This is an appeal from a judgment rendered by the United States District Court for the Central District of California. The court's jurisdiction was invoked under 28 U.S.C. Sect. 1332 and is based upon diversity of citizenship. Plaintiff is a citizen of the State of Virginia, and all defendants for purposes of federal court jurisdiction are citizens of the State of California (R. 139).

STATEMENT OF THE CASE

Plaintiff and appellant Athalie Irvine Smith originally filed this action against a number of defendants not including defendants and appellees Gloria Wood Irvine

and Security Pacific National Bank (formerly Security First National Bank) as Executors and Trustees of the Estate of Myford Irvine, Deceased. They were brought into the action upon motion of The James Irvine Foundation. We will refer to the interests of these defendants as the "Myford Irvine interests". To be perfectly clear, it should be mentioned that defendant Linda Irvine Gaede, a daughter of Myford Irvine, also comes within the general term the "Myford Irvine interests", but she is separately represented and not included in the term the "Myford Irvine interests" as used herein.

The District Court handed down its decision and judgment was duly entered in favor of all defendants. Plaintiff appeals. In view of the extensive briefing which will be done by other defendants, the Myford Irvine interests will make this brief indeed "brief". Discussion will be confined only to points most immediately connected with the Myford Irvine interests. Reference will be made only briefly to applicable case law, as it is believed a full and complete response to authorities cited by plaintiff will be made by other defendants.

Although it probably would be economically advantageous to the Myford Irvine interests for plaintiff to prevail, which would result in The Irvine Company stock being distributed to heirs of James Irvine, these defendants are convinced the contentions of plaintiff are not supported by the evidence and the findings of fact of the court below are not only not "clearly erroneous" but are indeed correct.

Plaintiff contends the trust created by the Indenture of Trust executed on February 24, 1937, (Exhibit A-1) was illegal and void for a number of reasons, set forth at pages 3 to 6 of her brief. They include, in general, assertions that James Irvine, as trustor, had no intent to divest himself of title to or control of the pertinent shares

of The Irvine Company stock; never intended title to that stock to pass to the Foundation; there was no effective delivery of the stock or the Indenture of Trust; and James Irvine died intestate as to those shares.

Plaintiff presents in support of these contentions little more than argument that a number of basic findings of fact by the District Court are wrong. She refers, *inter alia*, to these findings at pages 21 through 26 of her brief. In general, they are findings that there is no evidence James Irvine had possession of the Indenture of Trust after its execution; it was not found in his safe deposit box after his death; the Indenture of Trust following its execution was delivered to the Foundation and in its possession thereafter; the certificates of stock were endorsed in blank and delivered to the Foundation; and plaintiff, in general, failed to establish the non-delivery of the certificates of stock involved.

The contention that these findings are clearly erroneous is basically presented in two arguments, commencing at page 83 and page 98 of appellant's brief. It is urged that evidence of exercise of acts of ownership and dominion by James Irvine during his lifetime coupled with absence of activity on the part of the Foundation established non-delivery of The Irvine Company stock to the Foundation during James Irvine's lifetime.

ARGUMENT

I

FINDINGS OF FACT MUST NOT BE SET ASIDE UNLESS "CLEARLY ERRONEOUS"

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the oppor-

tunity of the trial court to judge of the credibility of the witnesses.”

Federal Rules of Civil Procedure, Rule 52(a).

Findings must be sustained by the appellate court if supported by substantial evidence and if, from the whole record, the appellate court is not left with the *definite firm conviction* that a mistake has been committed.

United States v. U. S. Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948);

United States v. Yellow Cab Co., 338 U.S. 338, 342, 94 L.Ed. 150, 70 S.Ct. 177 (1949);

California Airmotive Corp. v. Bass, 354 F.2d 453 (9th Cir. 1965).

II

THE FINDINGS OF FACT OF WHICH PLAINTIFF COMPLAINS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND ARE NOT “CLEARLY ERRONEOUS”. IF PLAINTIFF’S ARGUMENT IS TO BE ACCEPTED, THE CREDIBLE TESTIMONY OF A NUMBER OF REPUTABLE WITNESSES MUST BE COMPLETELY DISBELIEVED

Loyall McLaren, at times pertinent to this matter a senior partner in the accounting firm of Haskins & Sells, testified that James Irvine confirmed to him that Mr. Irvine had executed the Indenture of Trust and delivered it to the Foundation in the person of Myford Irvine and Miss Price as its officers (Rep. Tr. pp. 54-55).

Robert Gerdes, president of Pacific Gas & Electric Company and another highly respected California citizen, testified that as the attorney who prepared Mr. Irvine’s will, he had a number of discussions with Mr.

Irvine, who told him he had executed and delivered the Indenture of Trust and, in general, that he intended to have created a valid trust involving a majority of the outstanding shares of stock of The Irvine Company (Rep. Tr. pp. 1816-1817).

Kent Sawyer, a well-known San Francisco lawyer identified legal opinion letters which he had rendered to Mr. Irvine at the latter's request concerning the validity of the trust created by Mr. Irvine in 1937 to which he obviously contemplated making an addition in 1946 (Exh. A-56 and A-57). Mr. Sawyer's testimony and, indeed, the very existence of these exhibits are totally inconsistent with appellant's claim (Rep. Tr. pp. 447-458).

Mrs. Kathryn Wheeler testified her grandfather had confirmed to her during his lifetime the purposes for creation of the trust (Rep. Tr. pp. 3519-3522 and 3535-3538).

It is respectfully submitted that the findings of fact criticized by appellant, far from being clearly erroneous, are supported by persuasive evidence as to the validity of the Indenture of Trust and its due acceptance by officers of The James Irvine Foundation in 1937. Any findings to the contrary would have to be based upon inference and speculation.

There is substantial evidence in the record which supports and makes eminently reasonable both the findings and conclusions of the court below. The contention of appellant these findings of fact are clearly erroneous is simply not warranted.

CONCLUSION

The District Court's findings of fact are not "clearly erroneous" and, to the contrary, are "clearly correct". The judgment should be affirmed.

Respectfully submitted,

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No. 22607

IN THE

United States Court of Appeals

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ATHALIE IRVINE SMITH,

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vs.

THE JAMES IRVINE FOUNDATION, a corporation, *et al.*,

Appellees.

Appeal From the United States District Court
Central District of California.

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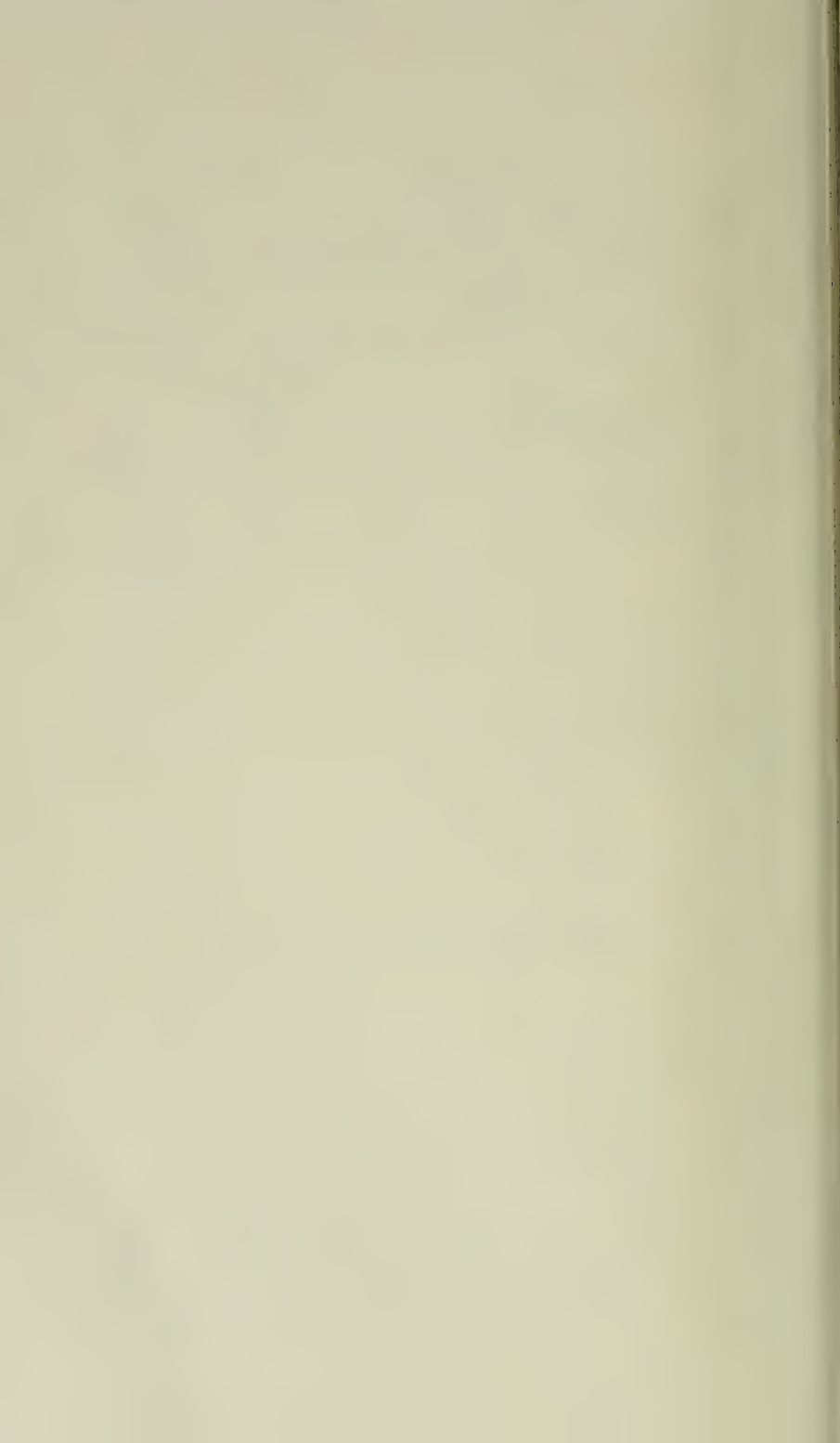
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No. 22607

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ATHALIE IRVINE SMITH,

Appellant,

vs.

THE JAMES IRVINE FOUNDATION, a corporation, *et al.*,

Appellees.

Appeal From the United States District Court
Central District of California.

BRIEF FOR APPELLEE.

Introductory Statement.

Defendant Thomas C. Lynch, Attorney General of the State of California, adopts the statement of the case set forth in the brief of the defendant The James Irvine Foundation in lieu of setting forth a separate statement of the case herein. In addition, this defendant adopts the arguments set forth in said brief of defendant The James Irvine Foundation and will confine the instant brief to the question of the validity of the Trust Indenture of February 24, 1937.

The substance of the plaintiff's argument as to the invalidity of the instant trust is that it was created for

non-charitable as well as charitable purposes and since no segregation of corpus is made for each purpose it must fail in its entirety as an unauthorized perpetuity.

We have no quarrel with the assertion that a trust cannot be established to exist in perpetuity for both charitable and noncharitable purposes. We do take issue with the plaintiff's contention that the existence in the trust instrument of provisions regarding investment of income in addition to those provisions regarding contribution of income serve to make the trust one for non-charitable as well as charitable purposes.

We shall see in the following discussion that a fair reading of the Trust Indenture discloses its purpose to be solely charitable; that the plaintiff's interpretation would convert a provision regarding the administration of the trust into an object of the trust.

ARGUMENT.

The Ruling of the Trial Court That the Indenture of Trust Dated February 24, 1937 Between James Irvine and The James Irvine Foundation Created a Valid and Effective Trust for Charitable Purposes Is Sound.

(a) **The Plaintiff's Comments Regarding Use of the Word "charitable" in the Trust Instrument Are Inconsequential.**

Preliminarily we should dispose of the plaintiff's comments that the word "charitable" has not been inserted in the Trust Indenture as often as the plaintiff believes necessary to create a charitable trust. Thus the plaintiff's initial attack is that the trustee is referred to in the above instrument merely as a corporation and not as a "charitable" corporation. (Brief for Appellant p. 58.) This, of course, is wholly immaterial for the charitable nature of The James Irvine Foundation is manifest from its articles of incorporation and was not in dispute in 1937 or thereafter. Thus there was no reason to use the adjective "charitable" whenever reference was being made to the corporation.

In addition, the nature of the trust created by the above instrument does not depend upon the character of the corporate trustee, for it is not essential that a corporation be a charitable one in order to hold property subject to a charitable trust. Calif. Corps. Code §9501(d).¹ See, *Estate of Henderson*, 17 Cal. 2d 853,

¹"Every non profit corporation may:

" . . .

"Act as trustee under any trust incidental to the principal objects of the corporation, and receive, hold, administer, and expend funds and property subject to such trust."

859, 112 P. 2d 605; *Estate of Willey*, 128 Cal. 1, 60 Pac. 471.

Similarly, the plaintiff's observation, at page 59 of her brief, that the trust instrument refers to "trust uses and purposes" rather than "charitable trust uses and purposes" is of no consequence since it is not the labeling or description of a purpose that makes it charitable or noncharitable. Rather, it is whether or not the purpose expressed fulfills the legal definition of charity that is controlling. See *Estate of Robbins*, 57 Cal. 2d 718, 724, 361 P. 2d 573.

(b) The Construction of the Language of the Trust Instrument Advanced by Plaintiff Is Wholly Unreasonable.

It appears to be plaintiff's position that the essential purpose of the trust, created by the trust indenture of February 24, 1937, was to accumulate corpus in perpetuity; that inasmuch as this is not a charitable purpose the trust is invalid as being an unauthorized perpetuity. The plaintiff refers to the provisions of the indenture (1) directing the trustee to apply income for the administrative expenses of the trust and to replace losses suffered in the trust corpus; (2) allowing the trustee in its discretion to set aside out of the balance of income such sums as it deems wise for investment which investments, when made, shall become part of the corpus of the trust; (3) directing the trustee to apply the balance of said income for the advancement of charitable purposes in the State of California.

The plaintiff baldly assumes the provisions regarding distribution of income for charitable purposes are subordinate to the provisions regarding investment of income and argues that since the trustee has unrestricted

discretion to devote income to investments the trust cannot be regarded as wholly charitable. (Brief for Appellant, pp. 61-63.)

A review of the trust indenture [Ex. A-1] discloses that the plaintiff's reading of that instrument is an unnatural one and that her conclusions are unsound.

Taking the approach of plaintiff, for the moment, of concentrating on particular wording, we note that the language of the indenture allowing application of income to investment commences with, "2. Out of the balance of said income," whereas the language referring to devoting income to charity commences with, "3. The balance of said income." (Indenture of Trust, pp. 4, 5.) We believe the difference in this language of these paragraphs is highly significant. The words opening paragraph number 2 connote the source from which *some* funds may be taken for investments whereas the words opening paragraph number 3 indicate that the trustor contemplated and intended that there would remain income to be applied for charitable purposes. Thus it cannot be concluded, as the plaintiff urges, that the trustee is given the power to invest *all* the income, following the deduction of expenses, and leave nothing to be distributed for charity.

In addition, while the trustor has set forth in the trust instrument directions as to the management of the ranch property, to which he had dedicated the greater portion of his life, he also set forth in unmistakable terms the charitable purposes to be advanced through the prudent management of the trust property, to wit:

"The Trustor has no intention or desire to restrict the Trustee in its selection of the specific

charities to be benefitted by this trust, nor to make any exclusive designation thereof. Nevertheless, the Trustor interprets the charitable purposes of The James Irvine Foundation as stated in its Articles of Incorporation to include financial aid generally to worthy individuals, who through illness or misfortune are temporarily in need. There is, for example, a very large body of self-respecting citizens who are not wealthy enough to afford for their families and themselves that same high quality of medical and surgical and hospital care which is open to the wealthy and also the very poor. It is the desire and hope of the Trustor that The James Irvine Foundation may find a means of extending such temporary aid to as many as possible of these worthy individuals and families, and in so doing, that worthy citizens and families residing in Orange County, California, be not overlooked.

“The Trustor also suggests that a revolving fund be created for loans not to exceed in the aggregate One Thousand (\$1,000.00) Dollars per person, with very moderate rates of interest, to worthy students and scholars who are in need of financial aid to carry on their studies in institutions of learning in California, and also in moderate amounts to scientists or individuals engaged in research work who require financial assistance therein.

“It is also the direction of the Trustor that charities receiving the substantial part of their support from taxation should not be beneficiaries of any of the property derived from this trust, but

that all such property, available from time to time for the benefit of charities, shall be used for such charities as do not enjoy any substantial support through taxation." (Indenture of Trust, pp. 9-10.)

Thus it is clear from the language of the trust instrument that the paramount concern of the trustor was the devotion of the trust income to charitable purposes. His businesslike interest in providing that the income shall be applied for trust expenses and that some of it may be used to enhance the trust corpus does not contradict or make uncertain the manifest charitable purpose for which this trust was created.

(c) The Plaintiff Has Failed to Distinguish the "Power" of the Trustee From the "Purpose" of the Trust.

Reading the trust instrument as a whole, as we are required to do,² it is clear that it cannot reasonably be interpreted as creating a trust for the purpose simply of enlarging the trust corpus. Rather, its *purpose* is the distribution of funds for charity. This being so, the *power* of the trustee to apply income to investments is necessarily circumscribed thereby.

Powers of a trustee exist to carry out the trust objective. They may not be exercised independently and in opposition to the purpose of the trust. They are subordinate to the purpose of the trust and must be exercised in a manner that will further that purpose. Thus, in the analogous situation, where a corporation contended

²"The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Calif. Civil Code § 1641. See *Moore v. Wood*, 26 Cal. 2d 621, 160 P. 2d 772; *Kraemer v. Kraemer*, 167 Cal. App. 2d 291, 334 P. 2d 675.

it was organized exclusively for charitable purposes and was therefore exempt from certain taxes and the taxing authorities argued that the powers of the corporation as expressed in its articles are not limited to the tax exempt purposes, the appellate court pointed out:

“The powers of a religious or charitable corporation are construed with reference to the purposes of its corporate existence. The statement in the articles of the objects, purposes, and powers of the corporation constitutes a limitation on the actual authority of the representatives of the corporation as between it and the state. (Corp. Code, § 803.) Powers are to be deemed ancillary to the purposes and are limited thereby. (General Conference of Free Baptists v. Berkey, 156 Cal. 466, 469-70 [105 P. 411]; Ballentine, California Corporation Laws, 171, §§ 184, 187; 46 Harv. L. Rev. 1337.)”

House of Rest v. County of Los Angeles, 151 Cal. App. 2d 523, 528, 312 P. 2d 392.

Again, with regard to some very problematical language concerning the powers of a corporation which was regarded by the taxing agency as not restricting the corporation's assets to charitable purposes, the Supreme Court held:

“. . . The statement in the articles that the ‘enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this corporation’ does not purport to be a general grant of power. Rather it appears to be a precautionary clause to signify that the incidental powers reasonably necessary to effectuate plaintiff's main pur-

poses shall not be limited by their specific enumeration. (See 7 Fletcher Cyclopedica Corporations, Perm. ed., ch. 42, § 3648, p. 780.) It does not give plaintiff any powers except such as are specifically conferred by the articles and those given by statute. Such powers are not unlimited powers, but are subordinate to plaintiff's main objects and purposes, which are wholly charitable." *Pacific Home v. County of Los Angeles*, 41 Cal. 2d 844, 850-51, 264 P. 2d 539.

So too in the case at bar, the discretion regarding investments is a *power* of the trustee relating to administration of the trust. As such, it cannot interfere with the *purpose* of the trust nor derogate from the charitable nature thereof.

(d) The Discretionary Actions of a Trustee Are Not Beyond Judicial Review and Correction.

For any abuse of discretion in the exercise of its powers the trustee would be subject to account in an action brought by the Attorney General.

"A nonprofit corporation which holds property subject to any public or charitable trust is subject at all times to examination by the Attorney General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may depart from the general purposes for which its formed. In case of any such failure or departure the Attorney General shall institute, in the name of the State, the proceedings necessary to correct the non-compliance or departure." Calif. Corp. Code § 9505.

See, *Pacific Home v. County of Los Angeles*, *supra*, 41 Cal. 2d 844, 854, 264 P. 2d 539; *House of Rest v. County of Los Angeles*, *supra*, 151 Cal. App. 2d 523, 529, 312 P. 2d 392; *Estate of Mayer*, 237 Cal. App. 2d 549, 553, 47 Cal. Rptr. 44.

In insisting that the trustee's discretionary power to invest income is limited by its duty to carry out the purpose of the trust we are not unmindful of paragraph 4 of the indenture (p. 7) reciting that the discretions conferred upon the trustee unless specifically limited shall be absolute. That paragraph does not purport to give the trustee power to invest income without any limitation for there is the inherent limitation that the trustee's discretion cannot be exercised to defeat the very purpose of the trust. In short, neither paragraph 4 nor any other provision of the indenture purports to allow the trustee to substitute the power regarding investment for the purpose of the trust.

"A trust created by will is properly controlled by the expressed intention of the testatrix; the particular language used is always important but the purpose of a trust is to be carried out no matter what the document says about the trustee's discretion. . . ."

Estate of Miller, 230 Cal. App. 2d 888, 907, 41 Cal. Rptr. 410.

See, *Estate of Ferrall*, 41 Cal. 2d 166, 176-77, 258 P. 2d 1009.

". . . it is beyond question that the issues of bad faith, fraud or abuse of discretion are always ap-

propriate in a court review of the actions of a trustee vested with absolute discretion . . .”

Estate of Patten, 217 Cal. App. 2d 167, 171, 31 Cal. Rptr. 767.

See, *Coberly v. Superior Court*, 231 Cal. App. 2d 685, 688-89, 42 Cal. Rptr. 64.

The plaintiff's fear, then, that the trustee may decide to abandon the purpose of supporting charities and instead devote itself to the sterile end of expanding corpus is groundless. It is well established that the courts will enforce charitable trustees, *In re Los Angeles County Pioneer Society*, 40 Cal. 2d 852, 257 P. 2d 1; *Mosk v. Summerland Spiritualist Assn.*, 225 Cal. App. 2d 376, 37 Cal. Rptr. 366; *Brown v. Memorial Nat. Home Foundation*, 162 Cal. App. 2d 513, 329 P. 2d 118, and, as the above quotations indicate, improper acts of a trustee are not rendered immune from judicial scrutiny merely because the trustee has been given discretion in administering the trust.

(e) It Is the Policy of the Law to Prefer the Construction That Gives Effect to Legal Instruments and to Favor Transfers to Charity.

Even if we were to concede for purposes of argument that the trust instrument is susceptible to the rather strange construction placed upon it by plaintiff, the applicable rules of construction and policy of the law would require we reject that construction in favor of one at least as reasonable which gives legal effect to the intent of the trustor and upholds the trust.

“A contract must receive such an interpretation as will make it lawful, operative, definite, reason-

able, and capable of being carried into effect, if it can be done without violating the intention of the parties." California Civil Code § 1643.

" . . . Where two interpretations are possible, one rendering the contract valid and the other rendering it illegal, the former, under elementary principles, is to be preferred."

Entremont v. Whitsell, 13 Cal. 2d 290, 297, 89 P. 2d 392.

Also applicable in determining the proper construction to be placed upon the indenture of trust before us is the policy of our law favoring transfers to charity.

" 'Courts look with favor upon all attempted charitable donations, and will endeavor to carry them into effect if it can be done consistently with the rules of law. A bequest intended as a charity is not void, and there is no authority to construe it to be legally void, if it can possibly be made good.' (Estate of Hinckley, 58 Cal. 457, 513; Collier v. Lindley, 203 Cal. 641, 654 [266 P. 526]; Estate of Bunn, 33 Cal. 2d 897, 903 [206 P. 2d 635]; see 14 C.J.S. § 6a, p. 427.) . . ."

Estate of Tarrant, 38 Cal. 2d 42, 46, 237 P. 2d 505.

See *Estate of Moore*, 190 Cal. App. 2d 833, 839, 12 Cal. Rptr. 436.

While the above statement of the Supreme Court was originally made with regard to a testamentary trust, neither reason nor legal precedent confine it to that form of trust. Indeed, the same statement is quoted

in the opinion of *Collier v. Lindley*, 203 Cal. 641, 645, 266 Pac. 526, which involved an *inter vivos* trust.

In accordance with these fundamental rules for construction of written instruments and the relevant policy of the law regarding charity, it is far more reasonable to construe the indenture of trust as giving the trustee the discretion to enhance the trust corpus by occasional investments of a portion of the trust income rather than the extraordinary power to invest the total income indefinitely for the sole purpose of enlarging the corpus. Plaintiff herself in urging the latter construction simultaneously, urges the reason for its rejection—it would result in defeating the trust and therefore cannot be favored over the construction that renders it valid and effective.

(f) The Construction Placed Upon the Trust Instrument by the Foundation Throughout Its Operation Evidences Its Charitable Purpose.

In construing the trust indenture we may properly look to that construction placed upon the instrument by the parties concerned with it these many years.

“ . . . a construction given the contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court. (Citations omitted). . . .”

Woodbine v. Van Horn, 29 Cal. 2d 95, 104, 173 P. 2d 17.

See,

Burns v. Peters, 5 Cal. 2d 619, 623, 55 P. 2d 1182;

Davenport v. Davenport Foundation, 36 Cal. 2d 67, 222 P. 2d 11.³

The defendant Foundation in distributing great sums to charity for some thirty years has indicated unequivocally it realizes the trust purpose is not the methodical increase of the trust corpus but the advancement of charitable purposes through contributing funds to established charities. Its construction of the trust instrument is both reasonable and persuasive.

The radical construction of the trust instrument offered by plaintiff finds no support in the language of the instrument viewed as a whole, or in the conduct of the trustee in all the years it operated the trust under said instrument. Rather, the instrument itself and the conduct of the trustee contradict the argument of the plaintiff and support the conclusion, unchallenged since its execution, that the trust indenture was intended to and did create a valid charitable trust.

³In *Davenport* the court concluded that the trust was created for the benefit of the trustor's descendants as well as for charitable purposes and therefore was in violation of the rule against perpetuities and void. However, in coming to this conclusion, the court applied the above rule in *Woodbine*, stating at pages 73-74, ". . . The trust was administered by the trustees with the assistance of the trustor for eight years before his death. The practical construction they placed upon the document is entitled to great weight in its interpretation."

(g) **The Exclusion of Tax Supported Charities as Donees of the Trust Has No Bearing Upon the Charitable Purpose of the Trust.**

The plaintiff has also taken the position that because of the direction in the trust instrument “. . . that charities receiving the substantial part of their support from taxation should not be beneficiaries of any of the property derived from this trust . . .” the trust does not qualify as a charitable one. In so concluding the plaintiff states “that public objectives and uses and purposes are fundamental to the validity of a charitable trust” and notes that the above quoted provision precludes support to public schools and institutions of the State of California. (Brief for Appellant, p. 28.)

The above conclusion of the plaintiff is unsound for while a charitable trust is one which is for the community or public benefit, Bogert, *Trusts & Trustees*, 2d Ed. § 369, p. 62; Scott on Trusts, 2d Ed. Vol. IV § 348, p. 2553; *Estate of Hart*, 151 Cal. App. 2d 271, 284, 311 P. 2d 605; *Estate of McKenzie*, 227 Cal. App. 2d 167, 172, 38 Cal. Rptr. 496, *Estate of Henderson*, 17 Cal. 2d 853, 857, 112 P. 2d 605, it does not follow that excluding tax supported charitable organizations from the bounty of this trust deprives the public of the benefit of the trust. In the very substantial contribution of income to various charities over many years the public has benefited greatly from this trust administered by the Foundation. The plaintiff has cited no authority and we are unaware of any that requires tax

supported institutions be eligible for trust contributions in order that the trust be recognized as charitable. Indeed, charities traditionally have come into existence to benefit the public in areas where government has not functioned or has functioned only slightly. As such they complement rather than compete with government in benefiting the public. The distinction then between tax-supported and other charities made in the trust instrument is quite understandable and properly within the judgment of the trustor.

Thus the restriction of contributions from the trust to charities not receiving substantial tax support does not impair the validity of this charitable trust.

Conclusion.

An objective reading of the indenture of trust fails to disclose that its purposes are other than charitable. The strained construction placed upon it by the plaintiff derives not from the language of the trust instrument but from advocacy alone. For this reason and those set forth in the brief of The James Irvine Foundation we urge that the plaintiff's contentions be rejected and that the judgment of the trial court be affirmed.

Respectfully submitted,

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In the United States Court of Appeals
for the Ninth Circuit

ATHALIE IRVINE SMITH,

Appellant,

vs.

THE JAMES IRVINE FOUNDATION,
a corporation, et al.,

Appellees.

No. 22607

BRIEF OF APPELLEE KATE L. WHEELER

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In the United States Court of Appeals
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ATHALIE IRVINE SMITH,

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Appellees.

No. 22607

BRIEF OF APPELLEE KATE L. WHEELER

This brief is filed on behalf of appellee Kate L. Wheeler who is joined in this action in her capacity as a member and director of defendant The James Irvine Foundation (Cl.Tr. 4-6). Mrs. Wheeler is the granddaughter of the late James Irvine and is one of his heirs-at-law and a beneficiary of one of the testamentary trusts established by his will and under the decrees of final distribution of his estate. If appellant were to prevail in this action, the stock of the Irvine Company in question would be added

to the corpus of these testamentary trusts resulting in a substantial financial benefit to Mrs. Wheeler and her heirs. Despite her personal pecuniary interest in the successful outcome of this case, Mrs. Wheeler retained separate counsel to represent her in opposing appellant's action.

Mrs. Wheeler's sole interest in this case is in seeing that her grandfather's wishes are carried out (Rep. Tr. 3525).

The parties involved in this case have already filed lengthy briefs. In order to avoid unnecessary repetition, Mrs. Wheeler adopts the statement of the case in the Foundation brief from the paragraph beginning at the bottom of page 6 and adopts the arguments and supporting authorities in the Foundation brief in their entirety. For the reasons set forth therein, we respectfully submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

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IN THE

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Appeal From the United States District Court
Central District of California.

APPELLANT'S REPLY BRIEF TO BRIEF FOR AP-
PELLEES THE JAMES IRVINE FOUNDATION,
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**APPELLANT'S REPLY BRIEF TO BRIEF FOR AP-
PELLEES THE JAMES IRVINE FOUNDATION,
ET AL**

The James Irvine Foundation and the individual defendants who are joined in plaintiff's action as directors, members and trustees of said corporation, will all be referred to in appellant's reply brief as the "defendant Foundation".

THE ATTACK ON PLAINTIFF

The bad manners displayed by the defendant Foundation in making a scurrilous attack on the integrity of the plaintiff for bringing her action in this case amounts to nothing more than a desperation defense by said defendant because of its total failure to meet the basic issues

involved in this appeal or to cite a single case which applies to the facts disclosed by the record in the plaintiff's case. By their carping false statements concerning the plaintiff's good faith in bringing this action said defendant's objective is to prejudice the judges of the Court of Appeals against the plaintiff and the merits of the plaintiff's case through its attempt to slur the good name of the plaintiff by a distortion of her activities during the past ten years as the largest individual stockholder in The Irvine Company and as the only director of said corporation who is a stockholder thereof.

It is true that the plaintiff has been compelled to be constantly on guard against the self-dealing activities of the defendant N. Loyall McLaren, the president of The James Irvine Foundation and said defendant's chairman of the board of directors of The Irvine Company and its chief executive officer. A short summary of a few of the background problems which have confronted the plaintiff during said ten-year period and which were responsible for the plaintiff's acts to protect her substantial financial interest in The Irvine Company, is as follows:

In 1951 Mr. McLaren, who was the tax advisor for the minor guardianship estate of plaintiff and therefore the plaintiff's trustee who stood in a confidential relationship to the plaintiff, overreached his position as said trustee and fraudulently and unjustly enriched himself from the guardianship estate of plaintiff by charging the guardianship estate the sum of \$10,405 for alleged services that he never rendered. Mr. N. Loyall McLaren represented to the guardian of the plaintiff's guardianship estate that he had been elected to the board of directors of The Irvine Company at the request of plaintiff's mother, who was her guardian, following the death of James Irvine on August 24, 1947, for the sole purpose of

protecting the plaintiff's interest as a stockholder in The Irvine Company. This representation by Mr. McLaren was fraudulent, false and untrue. The minutes of the special meeting of the board of directors of The James Irvine Foundation held on September 19, 1947, immediately following the death of James Irvine, disclose that a resolution was adopted which appointed the said Mr. McLaren as the nominee of said defendant Foundation to be a Foundation director of The Irvine Company. (Ex. A-14) Pursuant to this resolution Mr. McLaren attended the meeting of the board of directors of The Irvine Company on October 15, 1947 as such nominee-director. (Ex. 2) When the bylaws of said Irvine Company had been amended, which increased the directors from five to seven, Mr. McLaren immediately became the director for the defendant Foundation on the board of directors of The Irvine Company. Instead of protecting the financial interest of the plaintiff as a substantial stockholder in the said Irvine Company, Mr. McLaren served on said board of directors solely in the interest of The James Irvine Foundation which at all times was adverse to the best interests of the plaintiff. At said directors' meeting Mr. McLaren was present and approved a loan in the amount of \$180,000 to Brad Hellis and an associate of Mr. Hellis. Mr. Hellis was vice president and general manager and a director of The Irvine Company. This loan was based solely upon the false statement by Mr. Hellis that Mr. Irvine, before his "accidental" death which occurred under mysterious circumstances while Mr. Hellis was on a fishing trip to Montana with Mr. Irvine, had verbally promised Mr. Hellis that The Irvine Company would make him said loan in the amount of \$180,000. No writing of any kind or corroboration was presented to said board of directors to support the said false representation of Mr. Hellis, and no inquiry whatever was made by Mr. McLaren with

reference to the facts and circumstances connected with said alleged verbal promise of Mr. Irvine. Said loan of \$180,000 was used by Mr. Hellis in various self-dealing land transactions in which The Irvine Company participated with Mr. Hellis with the approval of Mr. McLaren. As a result of said loan and further financing provided by The Irvine Company, the said Mr. Hellis, during the time that he was the vice president, general manager and a director of The Irvine Company, unjustly enriched himself contrary to the law that was applicable to the fiduciary obligations of an officer and director of a corporation toward the stockholders of said corporation. The plaintiff did not learn of the various illegal activities of Mr. McLaren as said director of The Irvine Company until plaintiff became a director of said corporation in 1957. The following facts disclose a close relationship between Mr. McLaren and Mr. Hellis during the period 1947 to 1957. On May 17, 1950 Paul A. Dinsmore, who had been an employee of James Irvine during the lifetime of Mr. Irvine, was required to resign as a member, director and a vice president of the Irvine Foundation by Mr. McLaren, and Mr. Hellis was thereupon elected a director and member of the Irvine Foundation in the place of Mr. Dinsmore, and Mr. McLaren was elected vice president of the defendant Irvine Foundation in the place of Mr. Dinsmore. (Ex. A-14) Mr. Dinsmore was selected by his employer James Irvine to be not only an original member and director of the defendant Foundation, but also as the first vice president thereof. The removal of Mr. Dinsmore after the death of James Irvine is typical of the illegal activities of Mr. McLaren which are referred to by the plaintiff.

The first legal action taken by plaintiff which is referred to by said defendant Foundation as a serious effort by the plaintiff to "disrupt and discredit the

management" of The Irvine Company, which means the management of Mr. McLaren, involved the self-dealing activities of Mr. Hellis as an officer and director of The Irvine Company by reason of which he had unjustly and substantially enriched himself. The plaintiff was required to employ attorneys who made a thorough investigation of said illegal activities of Mr. Hellis and as a result thereof Mr. Hellis was required to resign as vice president, general manager and director of The Irvine Company, and also to resign as a director and member of The James Irvine Foundation, and there was also a forced settlement of the illegal joint land ownership interests between Mr. Hellis and The Irvine Company and the payment of a substantial sum of money by Mr. Hellis. It therefore appears that the assertion by the defendant Foundation that all of the legal actions of the plaintiff have been unsuccessful, is not true.

Myford Irvine, the president of The Irvine Company, committed suicide on January 11, 1959, after having finally realized that he had been used by Mr. McLaren as a party to the illegal activities of Mr. McLaren that were connected with the invalid 1937 indenture of trust, which had resulted in the disinheritance of himself and the other heirs of James Irvine from a very substantial part of the Estate of James Irvine, to wit, 510 shares of Irvine Company stock, all of which had caused him great financial stress and mental anguish. Tr. 2292-2298, incl.

Following the death of Myford Irvine, the James Irvine Foundation technically, but actually Mr. McLaren, took over control of The Irvine Company, lock, stock and barrel. Mr. McFadden, who was a member and director of The James Irvine Foundation, who was selected by Mr. McLaren, became the vicarious president of The Irvine Company, and Mr. McLaren elected himself as vice president of said corporation. Immediately there-

after Mr. McLaren brought out a friend from New York by the name of Roger Stevens for the purpose of promoting a new corporation which would take over the substantial assets of The Irvine Company. Mr. McLaren was to be an active participant and a stockholder in said new corporation which was to be called The Stevens Development Co. The plaintiff was again required to threaten legal action against the Irvine Foundation, The Irvine Company, Mr. McLaren and Mr. Stevens in order to protect her financial interest in The Irvine Company, and was once more required to employ attorneys to resist the illegal activities of Mr. McLaren. The Stevens Development Co. promotion was abandoned by Mr. McLaren when the plaintiff threatened that she would institute legal proceedings in the State of West Virginia where the Irvine Company was incorporated for the purpose of liquidating said corporation. Again plaintiff's threat of legal action was successful.

Because of the obvious illegal activities of Mr. McLaren and the other directors of The Irvine Company who were elected and controlled by the Irvine Foundation, the plaintiff instituted legal proceedings which would permit the plaintiff to have her attorney present at the meetings of the board of directors of The Irvine Company. Plaintiff was unsuccessful in this action upon the ruling of the court that under the laws of the State of West Virginia the board of directors of a West Virginia corporation had the exclusive right to determine who would be invited to attend the meetings of the board of directors.

The Board of Regents of the University of California indicated it was considering the establishment of a university on a site that was located on the land of The Irvine Company. The plaintiff insisted that The Irvine Company make a gift of said land to the said Board of Regents. Instead of joining with the plaintiff, Mr.

McLaren and the other directors of The Irvine Company who represented the Irvine Foundation immediately made a sale of the land which had been selected by said Board of Regents to a cemetery promotion corporation. Thereafter the plaintiff demanded that another location on the Irvine property be made available to the said Board of Regents. Mr. McLaren, Mr. McFadden and the other Foundation directors of The Irvine Company refused the plaintiff their cooperation and took the position that in any negotiations with the Board of Regents, said negotiations would have to be based upon a sale of said land, and not as a gift. Again, after much delay and opposition on the part of Mr. McLaren and his Foundation directors, the plaintiff prevailed and once more her efforts were not unsuccessful. Solely through the activities of the plaintiff the Board of Regents of the University of California received a gift from The Irvine Company of 1000 acres of land that is situated in Orange County and on which there stands today the University of California at Irvine.

Reference is made in the brief of defendant Foundation to the case of plaintiff and her mother Athalie R. Clarke against The James Irvine Foundation, et al, reported in 47 Cal.Rptr. 392. The facts disclosed in the opinion of the District Court of Appeal in this case covered a series of illegal self-dealing transactions that were carried on by one Long, who was a director and vice president of The Irvine Company, together with Mr. McLaren and Mr. McFadden that involved the property of The Irvine Company. Although said stockholder derivative action in accordance with the law named as defendants The James Irvine Foundation, The Irvine Company and all of the directors of each of said corporations, the principal defendants therein were Mr. Long, Mr. McLaren and Mr. McFadden. This litigation involved another activity of said principal defendants to unjustly enrich

themselves in violation of their fiduciary obligations to the stockholders of The Irvine Company, and contrary to the claim of said defendant Foundation, plaintiff's action was not unsuccessful. A demurrer was sustained to plaintiff's complaint but an appeal was taken and the judgment of the lower court was reversed as to said principal defendants Long, McLaren and McFadden. Pending the appeal in said case the principal witness for the plaintiff died and further proceedings by the plaintiff were thereby frustrated and she was compelled to dismiss said action.

The foregoing abridged summary of the background facts involving a few of the illegal activities of Mr. McLaren and with which the plaintiff has been confronted during the past ten years presents the true story of said plaintiff's actions and for which she has been villified by the defendant Foundation in its brief. (Tr. 234-257, incl. Testimony of Mr. N. L. McLaren; Tr. 2220-2368, incl. Testimony of Mrs. Athalie Irvine Smith; Tr. 1743-1781, incl. Testimony of Mr. Friedman).

THE DEFENDANT FOUNDATION WAS THE ALTER EGO OF JAMES IRVINE

The fatal error which permeates the entire brief of the defendant Foundation is based upon the unfounded assumption that the defendant Foundation, as the alleged trustee named in the indenture of trust, was a real bona fide trustee entity and not merely a shell and the shadow and the alter ego of James Irvine. The substantial evidence discloses that not only was the defendant Foundation the alter ego of James Irvine but, furthermore, Myford Irvine, as president of the defendant Foundation, and E. M. Price, as secretary thereof, served in each of said capacities as the servants and employees of their master James Irvine.

The alter ego or one-man corporation where the corporate entity is disregarded is a corporation that is so organized and controlled and its affairs are so conducted as to make it merely an instrumentality, agency, conduit, or adjunct of one individual. See the following cases:

Engineering Service Corp. v. Longridge Invest. Co.,
314 P.2d 563, 153 C.A.2d 464

Erkenbrecher v. Grant, 200 P.641, 187 C.7

Gordon v. Aztec Brewing Co., 203 P.2d 522, 33 C.2d
514

Kohn v. Kohn, 214 P.2d 71, 95 C.A.2d 708

McLaughlin v. L. Bloom & Sons Co., 24 Cal.Rptr.
311, 206 C.A.2d 848

Marr, et al, v. Postal Union Life Ins. Co., 105 P.2d
649, 40 C.A.2d 673

Minifie v. Rowley, 202 P.673, 187 Cal. 481

Minton v. Cavaney, 15 Cal.Rptr. 642, 56 C.2d 576

Riddle v. Leuschner, 335 P.2d 107, 51 C.2d 574

Shafford v. Otto Sales Co., Inc., 308 P.2d 428, 119
C.A.2d 349

Sweet v. Watson's Nursery, et al, 92 P.2d 812, 23
C.A.2d 379

Wilson v. Stearns, et al, 267 P.2d 59, 123 C.A.2d 472

THE RELATIONSHIP OF MASTER AND SERVANT BETWEEN JAMES IRVINE AND MYFORD IRVINE AND E. M. PRICE

The only relationship in law that existed between James Irvine, the individual, and Myford Irvine and E. M. Price during the entire period from 1917 to the date of Mr. Irvine's death on August 24, 1947, was that of

master and servant. It is therefore hornbook law that James Irvine absolutely controlled every act or deed of both Myford Irvine and E. M. Price as his servants and employees, and that each of them was under his absolute control regardless of whether he exercised said control or not. Their full time and undivided loyalty belonged to their employer James Irvine as his servants wherever he used them in connection with their duties as his employees and servants, whether in his alter egos The Irvine Company or the defendant Foundation, or in any other capacity or connection they were still his servants and were bound to him, and to no one else. Because of this exclusive master and servant relationship there was no separateness at any time during said period that identified any other status between said parties before or after the indenture of trust was signed by James Irvine on February 24, 1937, and August 24, 1947, the date of Mr. Irvine's death. Therefore regardless of whether or not the Irvine Company stock or the indenture of trust was in fact manually delivered by Mr. Irvine to Myford Irvine or E. M. Price, such delivery under the law was to said parties as the servants and employees of James Irvine and it is therefore conclusive as a matter of law that the possession of said Irvine Company stock and said indenture of trust continued to remain in Mr. Irvine's possession and under the control and dominion of Mr. Irvine. (32 Cal.Jur.2d, § 4, p. 398, § 9 p. 406-408)

All of the authorities relied upon by the said defendant Foundation and which are set forth in said defendant's brief are wholly and completely irrelevant to any of the issues involved in the plaintiff's case, particularly to the issue of the valid delivery of the Irvine Company stock or the 1937 indenture of trust.

The vital issue and question which arises in this case is: Was the Irvine trust definitely declared, and was the

subject of the trust, to wit, the Irvine Company stock, completely and entirely separated from the dominion and control of James Irvine during his lifetime?

Whether a gift is *inter vivos* or *causa mortis*, or made through the medium of a trust, it is none the less a gift and subject to the conditions which the law places upon gifts, and when a gift is made to the servants of the donor as the psuedo officers of the donor's alter ego trustee corporation, there is no distinct and absolute delivery of the trust property which legally constitutes a relinquishment of all dominion and control over the trust property by the donor. Even where there is a bona fide trustee involved it is necessary in order to constitute a valid gift in trust that the transfer must be consummated and not remain incomplete, or left in mere intention, and this is so whether the gift is by delivery only, or by the creation of a trust in a third person. Enough must be done to pass the title. The acts of the settlor in a true trust must be of that character which will admit of no other interpretation than that there has been a complete relinquishment of all dominion over the trust property. The settlor must transfer the property to a real and bona fide independent trustee. An intention to give evidenced by a writing must be satisfactorily established yet the intended gift may fail because no valid delivery is proved. And where an intention to give absolutely is evidenced by a writing which fails because of its non-delivery, the court will not and cannot give effect to an intended absolute gift by construing it to be a declaration of trust, and valid, therefore, without delivery. It must be clear, then, that the writing itself, however, definite it may be in its terms, proves no more than an intention on the part of the donor to create a trust for the actual delivery of the trust property after his death. If the Irvine Company stock did not pass from under

the dominion and control of James Irvine to a bona fide third party trustee, then the 1937 indenture of trust was at best no more than an ineffectual testamentary disposition. In other words, to be a valid and actual delivery, the indenture of trust must have been actually delivered to a bona fide third party trustee and have been meant by James Irvine to be presently operative as a conveyance, i.e., there must be the intent established by the substantial evidence that James Irvine divested himself of the title to the Irvine Company stock on February 24, 1937 when the indenture of trust was allegedly signed by him. Even if the indenture of trust was in fact manually delivered, as claimed by the defendant Foundation, there is no contradiction or conflict in the evidence but that the alleged delivery was made to either Myford Irvine or E. M. Price, who were then and there the servants and employees of James Irvine. The substantial evidence further established that said alleged delivery was to E. M. Price as the employee and servant of Mr. Irvine, and that thereupon the Irvine Company stock was placed by her in the safe that was in the office of her employer James Irvine. (Exhibits A-15, A-17. Tr. 1857). *Whitehead v. Bishop*, 23 Ohio App. 315, 318, 155 N.E. 565.

This is the evidence that was put in the record by the defendant Foundation through the documents that came from the files and records of said defendant and from its witness Mr. Gerdes. (Tr. 1816-1822, incl.) Under these circumstances there is no basis whatever to support the contention of the defendant Foundation that either the Irvine Company stock or the indenture of trust was ever actually or legally delivered at any time during the lifetime of Mr. Irvine to a valid trustee that had a definite existence that was separate from James Irvine, the individual, or his servants who were controlled by him and whose acts and deeds were his own acts and deeds, and whose alleged possession of the Irvine Com-

pany stock and the indenture of trust was the possession of their master and employer James Irvine. There is absolutely no escape possible from this conclusion as a matter of law. There is no evidence in the record in this case that will support any other conclusion or that will change the law that is applicable to the relationship of master and servant which existed between James Irvine, the master, and his servants Myford Irvine and E. M. Price. It will be recalled that this colorable transfer of the Irvine stock was based upon the plan which was conceived by James Irvine and his attorneys in connection with the preparation of the indenture of trust and the incorporation of the defendant Foundation. This plan was that the objective of all of the matters involved would be upon a basis that would enable James Irvine to exercise the full and complete control and dominion over the Irvine Company stock and the Irvine Foundation and The Irvine Company during his entire lifetime. This statement is confirmed by the evidence that was introduced by the defendant Foundation, to wit, Exhibit A-16, a letter dated June 12, 1936 from W. H. Spaulding, the attorney, to James Irvine, wherein Mr. Spaulding states to Mr. Irvine that under the provisions of the indenture of trust the Irvine Foundation "will hold these securities (Irvine Company stock) after your death". All of the substantial evidence that was introduced at the trial established that it was the intent of Mr. Irvine that the title to the Irvine Company stock was not to vest in the defendant Foundation, as trustee, until after he was dead. This manifestation of Mr. Irvine's post mortem intent is emphasized in every letter that passed between Mr. Irvine's attorneys and Mr. Irvine during the year 1936, as established by the copies of said letters which were introduced in evidence by the defendant Foundation. In said defendant Foundation's Exhibit A-15, a letter from Mr. Spaulding to James Irvine,

dated May 25, 1936, the post mortem intent involving the colorable transfer of the Irvine Company stock to E. M. Price, the employee and servant of Mr. Irvine, is clearly set forth where Mr. Spaulding states: "The fact is, however, that with a depositary,^{***} the trustee will, in fact, have little to do". The substantial evidence in the case is without conflict and conclusively established that the defendant Foundation, as the fiction trustee, not only had little, but actually no legal trustee status whatever and had nothing to do during the lifetime of Mr. Irvine. There was no administration of the purported trust until after the death of Mr. Irvine. Again, in the defendant Foundation's Exhibit A-17, a letter from Attorney Scarborough to Attorney Spaulding, the plan for the colorable transfer of the Irvine Company stock is again referred to as follows:

"... and the suggestion is made that the certificates of stock (Irvine Company stock), remain in Mr. Irvine's name, but that they be endorsed by him and delivered to Miss Price, as the secretary of the Foundation, and by her kept in the safe at Mr. Irvine's office in San Francisco, which will also be the office of the Foundation."

As hereinbefore referred to, Exhibit A-15, the letter from Mr. Spaulding to James Irvine disclosed that during Mr. Irvine's lifetime, with the Irvine Company stock being lodged with a depositary, the trustee "will, in fact have little to do". Obviously, the word "depositary" referred to the custodian of the Irvine Company stock, who was to be Miss Price and who would hold the stock as such depositary in Mr. Irvine's safe that was located in Mr. Irvine's office during the lifetime of Mr. Irvine.

JAMES IRVINE DIED INTESTATE AS TO THE 459 SHARES OF IRVINE COMPANY STOCK

The testimony of Mr. Gerdes which is set forth in the appendix to the brief for appellant is supplemented in the reply brief for appellant to include Mr. Gerdes testimony which disclosed the conversation he had with Mr. Irvine at the time of the preparation and execution of Mr. Irvine's will.

The testimony of Mr. McLaren, which is also set forth in the appendix to the brief for appellant, is supplemented to include Mr. McLaren's testimony which includes his conversation with Mr. Irvine with reference to the additional five shares of Irvine Company stock which Mr. Irvine purportedly added to the 505 shares of Irvine Company stock.

The testimony of both Mr. Gerdes and Mr. McLaren with Mr. Irvine, at the time he executed his last will and testament on May 14, 1946, disclosed in detail the testamentary plan which he intended would apply to the disposition of his entire estate, and that he therefore not only disposed of that part of the assets of his estate which passed under his will but he also had in mind and intended that none of the 510 shares of Irvine Company stock that were purportedly disposed of in the indenture of trust signed by Mr. Irvine on February 24, 1937, would ever be a part of his testamentary trust. Mr. Irvine's intention that the 510 shares of Irvine Company stock which is described in said indenture of trust was not to be included at any time under the trust provisions of his last will and testament and as set forth in Article Fifth of said will, is substantiated by Mr. Sawyer in his testimony with reference to the conversation that he allegedly had with Mr. Irvine on or about June 21, 1946. (Tr. 447-489, incl.)

This conversation which allegedly took place between Mr. Sawyer and Mr. Irvine and Miss Price, his secretary, was subsequent to May 14, 1946, which is the date that Mr. Irvine executed his will, and the purpose of the discussion with Mr. Irvine, according to the testimony of Mr. Sawyer was that Mr. Irvine wanted to know if the fact that the 510 shares of Irvine Company stock had not been transferred on the books of The Irvine Company to The James Irvine Foundation would affect the validity of the indenture of trust. Mr. Sawyer not only wrote a letter to Mr. Irvine with reference to his opinion that said failure to transfer the Irvine Company stock on the books of The Irvine Company would have no bearing on the validity of said indenture of trust, but Mr. Sawyer also wrote in a letter to Mr. Gerdes that in his opinion it would be advisable to include in Mr. Irvine's will a contest clause which would disinherit any beneficiary named in said Irvine will who might contest the validity of said 1937 indenture of trust. (Ex. A-58)

It is therefore conclusive that not only at the time Mr. Irvine executed his will on May 14, 1946, as well as thereafter up until the date of his death, James Irvine fully intended that the 510 shares of Irvine Company stock would be disposed of as planned by him under the 1937 indenture of trust entirely separate, independent and apart from that portion of his estate which passed under the trust provisions of his will. It further appeared conclusively that Mr. Irvine intended that in the event the trust created by the 1937 indenture of trust failed, the 510 shares of Irvine Company stock would not be included in his testamentary estate and under the trust provisions of his said will.

Mr. Irvine's will does not contain a general residuary clause. Article Fifth of the will of James Irvine is a specific residuary clause and not a general residuary

clause. If there is any general residuary clause at all in Mr. Irvine's will it is paragraph F, subparagraph 2 of article Fifth, which provides that if any after-acquired property is received by the testamentary trustees subsequent to distribution of Mr. Irvine's trust estate to said trustees, such after-acquired property shall be distributed share-and-share alike to the heirs of James Irvine.

The testamentary plan of Mr. Irvine having been established through the evidence introduced by the defendant Foundation by the testimony of said defendant witnesses Gerdes, McLaren and Sawyer, the conclusion that Mr. Irvine died intestate is inevitable insofar as the 510 shares of Irvine Company stock is concerned.

It is further stated in the brief for appellant that the 459 shares of Irvine Company stock which are held by the defendant Foundation on a resulting trust for the heirs of James Irvine, should be distributed in the proportion of one-third thereof to the plaintiff, one-third to Kathryn Lillard Wheeler, and the remaining one-third to Linda Irvine Gaede and James Myford Irvine. However, it appears from the brief of Kathryn Lillard Wheeler filed in this appeal that she has confirmed her renunciation of any interest in said 459 shares of Irvine Company stock as originally stated by her as a witness at the trial. (Tr. 3506-3546, incl.) Therefore the plaintiff requests that the judgment of this court for the distribution of said 459 shares of Irvine Company stock provide as follows: one-half ($\frac{1}{2}$) thereof or 229 $\frac{1}{2}$ shares to plaintiff, and the remaining one-half ($\frac{1}{2}$) thereof or 229 $\frac{1}{2}$ shares to Linda Irvine Gaede and James Myford Irvine.

There is set forth in the appendix to plaintiff's reply brief an excerpt from *Estate of Smith*, 64 Cal.Rptr. 295-297, incl. which supports the contention of the plaintiff

that Mr. Irvine died intestate as to the 510 shares of Irvine Company stock and that it was his testamentary plan that no part of said Irvine Company stock would ever become a part of the testamentary trust provisions which are contained in his last will and testament.

See also the following cases:

Estate of Bailess, 51 Cal.Rptr. 850, 249 A.C.A. 1088

Estate of Barnes, 47 Cal.Rptr. 480, 407 P.2d 656

Estate of Barnhart, 37 Cal.Rptr. 909, 226 C.A.2d 289

Beldon's Estate, In re, 17 P.2d 1052, 11 Cal.2d 108

Campbell-Kawannanamo v. Campbell, 152 Cal.201, 92 Pac. 184

Deacon's Estate, In re, 342 P.2d 261, 172 C.A.2d 319

Hoytema's Estate, 180 Cal.430, 181 P. 645

Klewer's Estate, 268 P.2d 547, 124 C.A.2d 219

Kuttler, Estate of, 160 C.A.2d 332, 325 P.2d 624

Maxwell's Estate, 158 C.A.2d 544, 322 P.2d 1018

Smith, Estate of, 64 Cal.Rptr. 295

Swallow's Estate, In re, 27 Cal.Rptr. 235, 211 C.A.2d 369

It further appears from the Report of the Inheritance Tax Appraiser in the Estate of James Irvine, Deceased, that it was the testamentary plan of Mr. Irvine that each of his heirs would have received an equal amount of his bounty as of the date of his death. When Mr. Irvine died on August 24, 1947, Myford Irvine, son of the said decedent, had already received from his father 200 shares of Irvine Company stock which, as of said date had a value of \$11,000. per share, or a total value of \$2,200,000. Under Mr. Irvine's will Myford Irvine received a legacy of one-

eighth of Mr. Irvine's estate, which was valued by the Inheritance Tax Appraiser at \$1,074.98. Myford Irvine therefore received both during his father's lifetime and under his father's will property of the total value of \$3,274,098. Linda Irvine Gaede, the daughter of Myford Irvine, received a legacy under the will of James Irvine which was valued by the Inheritance Tax Appraiser at \$809,922.91. It therefore appears that Myford Irvine and his daughter Linda received a total bounty from James Irvine of \$4,084,020.91.

The mother of Kathryn Lillard Wheeler died in 1920, which was before James Irvine made a gift of 200 shares of Irvine Company stock to James Irvine, 3rd, the father of Athalie Anita Irvine, and also had made a gift of 200 shares of Irvine Company stock to Myford Irvine, the father of Linda Irvine Gaede. Kathryn Lillard Wheeler received a gift from James Irvine of 50 shares of Irvine Company stock in 1935 which, at \$11,000. per share, had a total value of \$550,000. (Exhibits 8, Tr. 3649; B-15, Tr. 2084; B-16, Tr. 1138) In 1941 Kathryn Lillard Wheeler received a further gift of certain real property in San Francisco which had a value of \$385,000. (Exhibits 8, Tr. 3649; B-15, Tr. 2084; B-16, Tr. 1138). Kathryn Lillard Wheeler under the will of James Irvine received the sum of \$82,000. from insurance policies on the life of James Irvine, and under the will of James Irvine she received a legacy that the Inheritance Tax Appraiser valued at \$1,516,364.29. (Ex. 8, Tr. 3649) Kathryn Lillard Wheeler therefore received from James Irvine during his lifetime and under his will after the date of Mr. Irvine's death, the total sum of \$2,816,427.84.

Athalie Anita Irvine, the daughter of James Irvine, 3rd, upon Mr. Irvine's death received 200 shares of Irvine Company stock under a trust agreement between her father and James Irvine, which terminated upon the

death of James Irvine. The Inheritance Tax Appraiser valued the said 200 shares of Irvine Company stock as of the date of death of Mr. Irvine, at \$2,200,000.

Athalie Anita Irvine received a legacy under the will of James Irvine which the Inheritance Tax Appraiser valued at \$427,688.96. It therefore appears that Athalie Anita Irvine received from James Irvine a total bounty of \$2,627,688.96 or substantially less than was received by Myford Irvine and Linda Irvine Gaede, as well as the amount that was received by Kathryn Lillard Wheeler.

It would therefore be contrary to the testamentary plan of James Irvine if the 459 shares of Irvine Company stock were to be distributed to the surviving heirs of Kathryn A. Lilliard, the mother of Kathryn Lillard Wheeler, to Linda Irvine Gaede, the daughter of Myford Irvine, and to Athalie Anita Irvine, the daughter of James Irvine, 3rd, on the basis of the percentages bequeathed to each of said heirs in the last will and testament of James Irvine, to wit, Kathryn Lillard Wheeler, 4/8ths; Linda Irvine Gaede, 2/8ths; and the plaintiff, 1/8th.

THE IRVINE TRUST IS ILLEGAL AND VOID BECAUSE IT IS AGAINST PUBLIC POLICY AND IS IN VIOLATION OF THE POLICY ESTABLISHED BY SECTION 41 OF THE PROBATE CODE OF CALIFORNIA, AND IS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The purported trust created by the 1937 indenture of trust is against public policy and is therefore illegal and void. Section 62, Restatement of the Law — Trusts, 2d, provides as follows:

“A trust or a provision in the terms of a trust is invalid if the enforcement of the trust or provision

would be against public policy, even though its performance does not involve the commission of a criminal or tortious act by the trustee.”

Under the provisions of the 1937 indenture of trust the defendant Foundation illegally holds the legal title to 459 shares of Irvine Company stock which amounts to 53 per cent of the total outstanding stock of said corporation. This majority stock holding by said defendant Foundation illegally vests in said defendant the control of the board of directors and the management and destiny of The Irvine Company. Under this illegal control said defendant Foundation for the past 20 years has placed the 47 per cent financial interest of the plaintiff and the other minority stockholders in The Irvine Company in great peril and jeopardy. This control of a private independent corporation whose business is entirely unrelated to the pseudo charitable activities of a gimmick tax-exempt private foundation such as The James Irvine Foundation has been declared by the United States Treasury Department to be contrary to public policy. On February 2, 1965, the Secretary of the Treasury issued a report on private foundations in the United States and submitted the same to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the United States Senate of the Eighty-ninth Congress, and said report makes definite recommendations to both of said Congressional committees for the immediate adoption of legislation that will prevent private foundations such as the defendant Foundation from holding, either directly or indirectly, or through stock holdings, 20 per cent or more of a private corporation such as The Irvine Company whose business is unrelated to the charitable activities of the foundation.

Under this declaration of public policy and recommendation of the Treasury Department, the holding by

the defendant Foundation of 53 per cent of the stock control of The Irvine Company of which the plaintiff is the largest individual stockholder through her ownership of 21 per cent of the total outstanding stock, is illegal and void as being contrary to the best interests of the United States government as a matter of public policy.

The plaintiff requests the Court to take judicial notice of said Treasury Department Report on Private Foundations issued on February 2, 1965, and submitted to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the United States Senate, Eighty-ninth Congress, particularly the following that is contained on page 7 of said report:

“C. FOUNDATION INVOLVEMENT IN BUSINESS

“Many private foundations have become deeply involved in the active conduct of business enterprises. Ordinarily, the involvement takes the form of ownership of a controlling interest in one or more corporations which operate businesses; occasionally, a foundation owns and operates a business directly. Interests which do not constitute control may nonetheless be of sufficient magnitude to produce involvement in the affairs of the business.

Serious difficulties result from foundation commitment to business endeavors. Regular business enterprises may suffer serious competitive disadvantage. Moreover, opportunities and temptations for subtle and varied forms of self-dealing — difficult to detect and impossible completely to proscribe — proliferate. Foundation management may be drawn from concern with charitable activities to time-consuming concentration of the affairs and problems of the commercial enterprise.

For these reasons, the Report proposes the imposition of an absolute limit upon the participation of private foundations in active business, whether presently owned or subsequently acquired. This recommendation would prohibit a foundation from owning, either directly or through stock holdings, 20 percent or more of a business unrelated to the charitable activities of the foundation (within the meaning of sec. 513). Foundations would be granted a prescribed reasonable period, subject to extension, in which to reduce their present or subsequently acquired business interests below the specified maximum limit."

The purported trust created by the 1937 indenture of trust is illegal and void in that said purported trust is contrary to the policy established by Section 41 of the Probate Code of California as an attempted testamentary disposition in violation of said Probate Code Section 41.

The plaintiff has set forth in the appendix to this brief Section 41 of the Probate Code of California, and also Section 362.6, pages 2836-2937, inclusive, of Scott on Trusts, Third Edition. The issue of law which is here raised by the plaintiff has never been decided by the Supreme Court of the State of California. The only cases which are cited which have come to the attention of the plaintiff, neither of which has any application to a similar legal situation that is involved in this appeal, are the cases of *Bowdoin College v. Merritt*, 74 F.48, and *Rutherford v. Ott*, 37 C.A. 47, 173 P. 490. The federal case is a decision that was rendered in 1896 by the United States District Court for the Northern District of California, and the California State case was decided by the District Court of Appeal and never reached the Supreme Court of California.

Section 101 of the Revenue Act of 1934 and the Revenue Act of 1936 and Amendments thereto, and all regulations issued thereunder by the Commissioner of Internal Revenue are in violation of the Fifth and Fourteenth Amendments to the United States Constitution and are therefore void. The unequal and special privileges and rights which are granted to a private foundation corporation or trust to receive a 100 per cent tax exemption on its income from the trust fund where the donor also receives a 100 per cent tax deduction for the full cash value of his donation, whether in money, securities, real estate or works of art, is in violation of the rights of the plaintiff as a substantial federal income taxpayer in that the plaintiff, as a representative of a class of similar income taxpayers, is not granted equal rights or privileges but is restricted to a discriminative percentage of 30 per cent of her adjusted gross income for all charitable contributions which the plaintiff and similar income taxpayers make during any taxable year.

The 100 per cent income tax deduction allowed the donor and the 100 per cent tax exemption allowed the donee under said Revenue Acts and Amendments thereto covering the contributions made to private foundations is discriminatory and unequal to the plaintiff and all other similar United States income taxpayers.

Respectfully submitted,

LYNDOL L. YOUNG

Attorney for Plaintiff-Appellant
Athalie Irvine Smith

APPENDIX

TESTIMONY OF ROBERT H. GERDES

Q Prior to the time that you went on the board of directors of The Foundation did you have any discussion with Mr. Irvine about that appointment?

A Yes. He asked me if I would be willing to serve as a director, a member and director, of The Irvine Foundation. Prior to that time he told me that he wanted to become interested in the affairs, in his affairs, the affairs of The Irvine Company and The Foundation, and he asked me if I would be willing to serve, and at that same time he explained to me again what his general intents were with regard to the creation of The Foundation.

Q In substance, what did he tell you about what his intents were with respect to The Foundation?

A Well, he said that he thought he had been quite generous with members of his family and that he wanted to create a charitable trust for the benefit of worthy and needy people in the state and he felt that the state had been very good to him in that he had accumulated considerable property and wealth and he wanted to return some of this.

He also said that he thought it was important to have the control, or at least the majority of the members of The Foundation, which owned a majority of the stock of The Irvine Company, he wanted a majority of those directors to be men outside the family, who had had business experience, and he said that he had observed that other families that had accumulated considerable wealth frequently had extensive litigation and that it often tied up the operations of their properties; and so he thought it very important that they have outside individuals who could exercise their independent judgment and who would judge matters dispassionately as far as

the family was concerned; and for that reason he said that he would like me to serve.

Q You then accepted an appointment as a member and director of The James Irvine Foundation?

A I did.

Q And you continued from that time forward until this as a member and director of that corporation?

A I have.

Q Did you prepare Mr. Irvine's will?

A Yes.

Q I show you a copy of the document that has been marked for identification as Defendants' Exhibit B, and I will ask you if you can identify this copy as the document to which reference has been made.

A Well, it looks like the will that was admitted to probate, without comparing every page.

Q What was the date of execution of the will, Mr. Gerdes?

A May 14, 1946.

Q Approximately how long was this will in the course of preparation between you and Mr. Irvine?

A I have no definite recollection, but I have — my impression is that it was a matter of a few weeks where he was giving me information and I would give him a draft and he would look at it and make suggestions.

Q In connection with the preparation of the will, did you discuss with Mr. Irvine his various property affairs as of that time?

A Yes, he discussed some of them with me.

Q Did he discuss specifically with you anything to do with stock of The Irvine Company?

A Yes. He said that he had given his son Myford — which of course I knew by that time — 200 shares; that he had given, that 200 additional shares were given in trust for his son then deceased, James Irvine, which was under a trust; that he had given 50 shares, as I recall it, to Kate Wheeler, and 40 shares too, as I recall it, under a trust created for the benefit of his then wife.

Q Was that Mrs. Katharine Brown Irvine?

A Yes. And he also said that he had only five shares left and that he desired and intended to give that to The Foundation and also at the same time that he intended to revoke the trust insofar as it applied to The Moraga Company stock.

Q All right. Did you have any discussion about the matter of the initial 505 shares that had been transferred by the Indenture of Trust that you alluded to earlier?

A Yes. He said that — which he had already told me — that he had made a gift of that stock to The Foundation in 1937.

Q You knew that already at the time that you were preparing the will?

A Yes. He told me that a number of times before.

Q Subsequently did you become aware of Mr. Irvine carrying out this intended plan he told you about of transferring his remaining five shares in The Irvine Company stock to The Foundation?

A Subsequently he did that.

MR. PRIVETT: I am referring to Exhibit A-14, Mr. Young.

MR. YOUNG: Okay.

MR. PRIVETT: I will be referring to page 106 of Exhibit A-14, which are the minutes of the regular meeting of the directors of The James Irvine Foundation on Wednesday, June 26, 1946 at 2:30 p.m.

Q Mr. Gerdes, I will ask you to look at pages 106 and 107 of these minutes, and particularly the information beginning at about the middle of that page. Would you review that please and tell me if you can — Review it first.

A Well, as a matter of fact I have recently read these minutes and I am somewhat familiar with the content.

Q The minutes contain in full a letter dated June 20, 1946, from Mr. Irvine to The Foundation, commencing at about the middle of page 107, do they not, Mr. Gerdes?

A These are the minutes that have to do with the original — the acceptance by The Foundation of the — no. Yes. These are the minutes that have to do with regard to the gift of the five shares of Irvine Company stock to The Foundation and the withdrawal of the 12,750 shares of The Moraga Company stock from that trust.

Q Were you present at that meeting at which this letter was presented?

A Yes.

Q And do you recall the presentation of this letter to the directors at that meeting?

A Yes, because it was the custom of Mr. Irvine, in cases of all these foundations, he would sit in the chair as president and —

Q Do you mean Mr. Myford —

A Myford Irvine — and read the letter from Mr. Irvine.

Q Is the action that is reflected on the succeeding page or pages of the minutes with respect to that gift, being the resolutions of the directors — do the minutes correctly reflect the action taken at the meeting?

A These minutes reflect the actions taken by the directors of The Foundation at that meeting, as far as I can recall them.

Q Thank you. You attended the meetings during the period of time you went on the board up until the time of Mr. Irvine's death, did you not, Mr. Gerdes?

A Of The Foundation?

Q Yes.

A I don't recall whether I attended all of them. I attended some of them.

Q Was Mr. James Irvine himself ever in attendance at any of the meetings you attended during his lifetime?

A My best recollection is that he attended one or two of those meetings, but it is not too clear in my mind because I attended quite a number of meetings in his office at which he was there and more or less the same people were sitting around, and it is not clear in my mind whether he was or was not there at that time; but my impression is he was at some of them.

Q At or about the time that you were engaged in the preparation of Mr. Irvine's will did Mr. Irvine discuss with you any question related to the manner in which he had made transfer of the stock of The Irvine Company to The Foundation?

A Well, he told me that he had made this gift, that he had endorsed the stock in blank and delivered it to The Foundation, to Mr. Myford Irvine and Miss Price, as I recall it.

Q Did he ever ask you whether in your legal opinion that was a valid manner of transferring the title of the stock to The Foundation?

A Yes, he did at — I believe it was after the will was executed.

Q Whenever it occurred, whether it was before or after, what did he ask you with regard to the validity of the manner of transferring?

A Well, he asked, he told me that he had endorsed it in blank and delivered the stock to The Foundation; as I say, to Mr. Myford Irvine and Miss Price. He told me also that he had had the stock transferred on the books of the corporation because he wanted to and did receive the dividends during his lifetime and voted the stock.

MR. PRIVETT: I am referring now, Mr. Young, to Exhibit A-56 in evidence.

Q I show you a letter dated June 22, 1946, Mr. Gerdes, which is a letter that has been put in evidence, written by Mr. Kent Sawyer to Mr. James Irvine, showing copy to Robert H. Gerdes, and ask you if you will identify that letter as one that you did receive.

A Yes, I received a copy, I recall receiving a copy of this opinion written, I believe, by Mr. Sawyer of that law firm of Hall, Henry & Oliver.

Q Can you recall the context of the circumstances under which you received a copy of this letter, why it came to you?

A Mr. Irvine, either before or after the making of his will, and I think it was after but I am not sure, asked whether I thought the fact that the stock had not been transferred of record had any effect on the completion of that as a gift; and I told him that on the basis of my

understanding of the law — and I had had occasion to go into this subject during my practice in general — I told him that I didn't think the transfer on the books of the company was necessary, that I hadn't looked it up the last several years, and I thought it would be wise to have it fixed up.

I told him right at that time I was quite busy, and suggested that he then ask the Hall firm to give him an opinion on the subject, and I assume that is why I received a copy of this letter.

Q All right. I show you a copy of Exhibit A-57 in evidence, which is a letter on the letterhead again of Hall, Henry & Oliver, dated July 9, 1946, addressed to Mr. James Irvine, which is a letter that was prepared and sent by Mr. Kent Sawyer again, and it shows copy to Robert H. Gerdes, Esq.

A Yes. I remember receiving that.

Q I show you now Exhibit A-58 in evidence which again is a letter on the letterhead of Hall, Henry & Oliver, dated August 26, 1946 and this letter is addressed to Robert H. Gerdes, Pacific Gas and Electric Company, and it says, "Re The James Irvine Foundation," and it is signed Kent A. Sawyer, and ask you if you can identify that as a letter which you received shortly after the date that it bears?

A Yes. I remember receiving this letter.

Q The subject of that letter appears, Mr. Gerdes, to be an inquiry regarding the applicability of certain sections of the California Probate Code to Mr. Irvine's gift of stock of The Irvine Company to The Foundation. Do you recall the circumstances under which that letter was sent to you?

A Well, I asked Mr. Sawyer for his opinion, and that is why it was sent.

Q Do you recall what it was or anything about why you were prompted to make an inquiry about these particular code sections?

A I can't remember whether Mr. Irvine made an inquiry or whether I did it on my own.

Q Will you refer to the past paragraph of that letter.

A Yes.

Q There is in this paragraph a suggestion, it reads as follows, the last paragraph:

"The only thing that occurs to me (apart from the necessity of following California legislation and decisions, with the provisions of this instrument in mind) is that a possible reference might be made to the trust and the will which would have the effect of inhibiting a contest of the trust by a beneficiary of the will who might otherwise, in view of the magnitude of the properties and relatively trifling expense, be tempted to litigate the issue despite the holdings of the California courts.

"I shall be glad to discuss this question with you further."

Do you recall any subsequent discussion that you had or may have had with Mr. Irvine with respect to this?

A Yes. Some time after I received this letter, we talked of a number of things, and I called this matter to his attention and he said, "Well," he said, "we have an opinion that it is valid, that the transfer as it was made in 1937 is valid and requires nothing further." He says, "You have that opinion." He said, "I see no reason

now why we need to do anything further,” and I believe I later told Mr. Sawyer that when he asked me.

Q Now, from the time of this discussion you have just identified concerning the gift of stock that Mr. Irvine had made to The Foundation, do you recall any other consultation or conversation with Mr. Irvine on this subject, from this time in 1946 until his death on August 24, 1947?

A I have no recollection of any such discussion.

Q In Mr. Irvine's will he designated certain people to be executors and trustees of the trust established under that will, did he not, Mr. Gerdes?

A Correct.

Q And the people named to be the executors were Myford Irvine, his son, Katharine Brown Irvine, his wife, and yourself, were they not?

A Initially, yes.

Q And then, in addition he named certain people who were to serve as substitute executors and trustees and specified the order, if substitutes were to be appointed, in which these persons named should be appointed?

A That is correct.

Q And this first such person named as a substitute was Miss E. M. Price, was it not?

A Yes.

Q And had you known Miss Price over the years?

A Yes. She was in the office of Mr. Irvine and acted as secretary and handled many of the details of his affairs, and I knew her almost from the time that I knew Mr. Irvine or maybe even before.

Q In addition, she was the Secretary and Treasurer of The James Irvine Foundation from that period of time at all times until her death in 1959, was she not?

A Yes.

Q The next substitute of an executor or trustee to be appointed in case one was appointed named in the will was Mr. Loyall McLaren?

A Yes.

Q Had you known Mr. McLaren prior to the time of Mr. Irvine's death?

A Well, I knew him, but it is not clear in my mind exactly the date when I became quite — came to know him quite well; but I knew him.

Q And at the time of Mr. Irvine's death, you were appointed along with Myford Irvine and Katharine Brown Irvine as an executor of Mr. Irvine's estate, were you not?

A Yes.

Q And you served from that period in September 1947, when that appointment was made, until his estate was closed by the entry of the decree of final distribution in December of 1952?

A That is correct.

Q During that period, just so we have the outline of the examination about this period, Katharine Brown Irvine died in April of 1950. Do you recall that, Mr. Gerdes?

A I know she died about that time. I don't know the exact date.

Q And then was the first named substitute in the will appointed to succeed her as executor of the estate?

A Yes.

Q Now, who did you employ as your counsel to represent you as an executor of the estate of Mr. Irvine?

A Well, after a conference with Myford Irvine, one of my co-executors, we determined to appoint Chaffee Hall, and we did.

Q And was there some other lawyer that was appointed to represent Katharine Brown Irvine?

A Well, Mrs. Irvine, we talked to her and she said she would like to have as her attorney Mr. Wheeler, we call him Todd Wheeler, I have forgotten what is — Charles —

Q — S. Wheeler, Jr.?

TESTIMONY OF N. LOYALL McLAREN

Q Mr. McLaren, I am going to hand you the original copy of the exhibit that has been marked as Exhibit A-13, a letter from James Irvine to The James Irvine Foundation, dated June 20, 1946. At the top, 820 Crocker Building, San Francisco, California. It bears a signature of James Irvine. Then at the bottom of the further writing it bears the name The James Irvine Foundation by Myford Irvine, President, and it bears the signature of Myford Irvine.

Would you examine that, please?

(Brief pause.)

A I have examined it.

By MR. PRIVETT:

Q Prior to the date of this letter, June 20, 1946, did you have any discussions with Mr. Irvine with respect to

any changes in the property held by The Foundation under the terms of the indenture of trust?

A I did.

Q Will you tell us, please, what was discussed between you and Mr. Irvine in that regard.

A Mr. Irvine told me that he only had left five shares of the stock of The Irvine Company, and that by adding this holding to the shares already owned by The Foundation, that it would bring the total holding up to 51 per cent, which would clearly establish control, and might at some time have an effect on cumulative voting and matters of that kind.

He also said that he had given considerable thought to The Moraga stock held by The Foundation, and that his main interest all along, having been the matters affecting The Irvine Company and the holding of The Irvine Company stock by The Foundation, that he thought it would be a wise thing to do to withdraw that stock from The Foundation, and to that extent increase the inheritance of his heirs.

He asked me whether or not either of those two steps would in my opinion have any adverse tax effects.

I told him no, which was followed a short time later by this letter of June 20, 1946, addressed to The James Irvine Foundation.

Q Would you look to the minutes, the original minutes that you have before you. Just retain that letter there for a moment, Mr. McLaren, and look to the minutes. I will give you the page number. It is page No. 107.

A Yes.

Q These are the minutes beginning at page 106, the regular meeting of the directors of The James Irvine

Foundation, held on Wednesday, June 26, 1946 at 2:30 P.M. in room 820, Crocker Building, San Francisco.

Were you in attendance at this meeting, Mr. McLaren?

A I was.

Q Will you refer now to the page 107, about the middle of the page. There appears to be in type the letter that you have just alluded to. Can you tell me if that letter was read to the directors of The Foundation or otherwise presented to them during the course of that meeting?

A The letter was read to them.

Q Turning now over to page 109, where it says just down from the end of the first paragraph in parenthesis "Continued from page 108." Do you find that, Mr. McLaren?

A I do.

Q It says:

"The president advised that he accepted the five shares of stock of The Irvine Company as an addition to the trust property referred to in said instrument dated June 20, 1946, and returned to Mr. James Irvine the 12,750 shares of stock of The Moraga Company which had been withdrawn from said trust. After discussion of the matter upon motion duly made and seconded the following resolution was unanimously adopted. Resolved that the said five shares of stock of The Irvine Company be and they are hereby accepted as in addition to the trust property provided for in that certain indenture of trust dated the 24th day of February, 1937 wherein James Irvine as trustor and this corporation as trustee, and the acts of the president accepting said shares of stock be

and the same is hereby ratified, confirmed and approved as the act and deed of this corporation.”

Does that truly reflect, Mr. McLaren, the action that was taken at the meeting of the directors of The James Irvine Foundation held on June 26, 1946?

A It does.

Q In the resolution immediately following that is a resolution which ratifies, confirms and approves the act of the president in returning the 12,750 shares of stock of The Moraga Company to James Irvine. Is that a resolution which was also acted upon at this meeting?

A It is.

SECTION 41, PROBATE CODE OF CALIFORNIA

§ 41. Charitable and benevolent devises and bequests; restrictions

No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, by a testator who leaves a spouse, brother, sister, nephew, niece, descendant or ancestor surviving him, who, under the will, or the laws of succession, would otherwise have taken the property so bequeathed or devised, unless the will was duly executed at least 30 days before the death of the testator. If so executed at least 30 days before death, such devises and legacies shall be valid, but they may not collectively exceed one-third of the testator's estate as against his spouse, brother, sister, nephew, niece, descendant or ancestor, who would otherwise, as aforesaid, have taken the excess over one-third, and if they do, a pro rata deduction from such devises and legacies shall be made so as to reduce the

aggregate thereof to one-third of the estate. All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected.

Nothing herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity or in trust for a charitable use, in any person who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relative, unless and then only to the extent that such relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will. (Stats.1931, c. 281, p. 589 § 41, as amended Stats.1937, c. 480, p. 1435, § 1; Stats.1943, c. 305, p.1296, § 1.)

In re Estate of Smith, 64 Cal.Rptr. 295,

“The trial court nevertheless concluded that the expression, “my personal belonging,” was ambiguous as to what belongings were meant. Extrinsic evidence was received, showing that the formal will was carefully coordinated with the *inter vivos* trust held by respondent bank. That trust had been amended by testatrix after the date of the codicil so as to indicate that she continued to regard the trust and the formal will as constituting an integrated and complete estate plan. Such an understanding on her part would have been utterly inconsistent with the intention, now attributed to her by appellant, to give appellant by means of a codicil

a general power of appointment covering the entire residue of the estate."

2836

"SCOTT ON TRUSTS

§ 362.6

"In England under the Georgian Statute of Mortmain it was expressly provided that no land should be given in trust except by deed sealed and delivered in the presence of two or more witnesses at least twelve months before the death of the donor, and 'unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him.' It is clear that this statute forbade not only devises for charitable purposes but also dispositions inter vivos where the settlor reserved either a beneficial life interest or a power of revocation.

"In the United States the statutes in jurisdictions in which restrictions upon the creation of charitable trusts are imposed are not so clear. As we have seen, these statutes provide either that no devise or bequest for a charitable purpose shall be good if the will is executed within a certain time before the death of the testator, or that the testator can devise or bequeath for charitable purposes not more than a half or a third of his estate. The question then is whether these statutes are applicable where a trust is created inter vivos for charitable purposes, and the settlor reserves a life estate and a power of revocation or modification. The question is whether such a disposition is so far testamentary as to fall within these restrictive statutes. It is held that it does not.

In *City Bank Farmers Trust Co. v. Charity Organization Society* the settlor executed a trust indenture transferring property to a trust company in trust to pay the income to himself for life and on his death to certain charitable organizations. He reserved power to revoke the trust and provided that the trustee should not make investments except with his consent. He died without having revoked the trust. After his death his daughter sought to set aside the trust, contending that it was invalid on the ground that it was a testamentary disposition and the trust instrument was not executed in accordance with the requirements of the Statute of Wills, and that it was in violation of the Decedent Estate Law, § 17, which provided that no person leaving a husband, wife, child or parent should devise or bequeath for charitable purposes more than one half of his estate, and that the disposition was made fraudulently for the purpose of evading the statute. The court held that the trust was valid.

“The question is at least open to argument. If the settlor can create a living trust under which the property is ultimately to go to charity, but he reserves the same potential control which he would have if the disposition were made by will, it is arguable that the purpose of the statute is defeated. Where a settlor creates a trust *inter vivos* and reserves a power of revocation, it is possible for him to enjoy the property if he so wishes at any time as long as he lives, and the persons who are to take the beneficial interest on his death are in a precarious position until he dies, since they may be deprived by the exercise of the power of revocation of all interest under the trust. In substance the situation is not very different from that which arises where

the owner of property has made a will. Even though a revocable trust created inter vivos has some of the aspects of a testamentary disposition, yet the courts have wisely refused to hold such trusts invalid merely because they are not executed with the formalities of a will. The purpose of the Statute of Wills is to prevent fraudulent claims, but in the case of a trust created inter vivos there is no more danger of fraud where a power of revocation is reserved than where the trust is irrevocable. Different considerations enter in, however, where a settlor attempts to do by means of a revocable trust created inter vivos what he could not do by will. The policy underlying the restriction on dispositions by will may well be held to be equally applicable to revocable trusts created inter vivos. In states in which there is a policy forbidding a testamentary disposition in favor of charitable purposes of more than a certain proportion of a man's estate, it may be contended that the policy is applicable to dispositions inter vivos where the settlor reserves a power of revocation. A similar problem arises, as we have seen, with respect to the statutory rights of a surviving spouse in the estate of a deceased spouse. The courts, however, have generally held that these statutes impose no restrictions upon the creation of a trust inter vivos, even though the settlor reserves a life interest and a power of revocation.

“The question may arise whether these statutes restricting charitable dispositions by will are applicable where a settlor creates a trust for himself for life and on his death as he may appoint by will. We have seen that where a power of appointment is given to another person, it has been held that the exercise of the power does not fall within the statu-

tory restriction. It may be different, however, where a power of appointment is reserved by the settlor. In such a case it would seem that the policy of the statute is applicable."

No. 22607

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

ATHALIE IRVINE SMITH,

Appellant,

vs.

THE JAMES IRVINE FOUNDATION, a corporation, *et al.*,

Appellees.

Appeal From the United States District Court
Central District of California.

APPELLANT'S REPLY BRIEF TO BRIEFS FOR AP-
PELLEES KATHRYN LILLARD WHEELER, AND
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IC NATIONAL BANK, AS EXECUTORS AND
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IRVINE, DECEASED

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Attorney for Appellant.

FILED

AUG 12 1968

WM. B. LUCK, CLERK

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The defendants Kathryn Lillard Wheeler, Gloria Wood Irvine and Security Pacific National Bank, have taken an adverse position to the plaintiff and would have the court believe from the contents of their respective briefs that they are motivated in doing so by charitable and altruistic purposes. The record, however, discloses that their adverse interest to the plaintiff's action is based on their respective positions and the potential liability with which they are confronted as defendants in plaintiff's action. The defendant, Kathryn Lillard Wheeler, has been a member, director and trustee of the defendant foundation since 1950 and during this period

said defendant foundation has received dividends and capital gains on 459 shares of Irvine stock in the sum of approximately \$13,000,000.

Plaintiff in her amended complaint not only seeks the recovery of the 459 shares of Irvine stock for the heirs of James Irvine, deceased, but also seeks the recovery of said sum of \$13,000,000 as part of the trust fund which said defendant foundation holds on a resulting trust for the heirs of James Irvine, deceased. Plaintiff's action seeks a joint and several judgment against all of the individual foundation defendants for said sum of \$13,000,000. It is plaintiff's contention that whatever the defendant foundation has received under the 1937 indenture of trust must be accounted for as property which said foundation trustee holds on a resulting trust for the heirs of James Irvine, deceased. Therefore, the defendant Kathryn Lillard Wheeler faces a substantial financial liability which is involved in the outcome of the plaintiff's action, and this potential liability is the real basis for said defendant's adverse position to the plaintiff's action.

The same situation that applies to the defendant, Kathryn Lillard Wheeler, also confronts the defendant, Gloria Wood Irvine, and the Security Pacific National Bank, as the executors and trustees of the estate of Myford Irvine, deceased. Gloria Wood Irvine is not an heir of James Irvine, deceased, and is not a beneficiary under the will of said decedent and therefore said defendant would not participate in any recovery that results from the plaintiff's action. However, Myford Irvine was a member, director, trustee and president of the defendant foundation from the date of the death of James Irvine on August 24, 1947, to the date of Myford Irvine's death on January 11, 1959. Said estate of

Myford Irvine, deceased, therefore faces a joint and several liability under the plaintiff's action for the sum of \$13,000,000 which was received by said defendant foundation as dividends and capital gains on the 459 shares of Irvine stock.

Gloria Wood Irvine is also aligned with the interests of the defendant foundation for the reason that she is under moral obligation to said defendant because through the control of the Irvine Company by said defendant foundation, the Irvine Company purchased from the estate of Myford Irvine, deceased, 50 shares of stock of the Irvine Company for a sum in excess of \$5,000,000.

James Myford Irvine, the minor son of Myford Irvine and Gloria Wood Irvine, is an heir of James Irvine, deceased, and as such heir he would benefit substantially from the successful outcome of plaintiff's action.

The defendants' Kathryn Lillard Wheeler and Gloria Wood Irvine and Security Pacific National Bank, as executors and trustees of the estate of Myford Irvine, deceased, are further confronted with a potential liability to the United States Government as transferees who will be required to account to the Internal Revenue Service for all income taxes that are found to be due from the defendant foundation on all of the dividends and capital gains received by said defendant foundation since 1947 to date.

It is therefore understandable why the defendants, Kathryn Lillard Wheeler and Gloria Wood Irvine, who is not the mother of Linda Irvine Gaede, and the Security Pacific National Bank, stenuously oppose a judgment in favor of the plaintiff and the heirs at law of James Irvine.

The defendant Kathryn Lillard Wheeler as a witness at the trial of plaintiff's action renounced for herself any interest in the 459 shares of Irvine Company stock, which is the subject of the plaintiff's amended complaint. This same renunciation is again repeated in the brief of said defendant, Kathryn Lillard Wheeler, which has been separately filed in reply to the brief for appellant. (Tr. 3506-3546 incl.)

Respectfully,

LYNDOL L. YOUNG

Attorney for Plaintiff-Appellant
Athalie Irvine Smith

No. 22607

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ATHALIE IRVINE SMITH,

Appellant,

vs.

THE JAMES IRVINE FOUNDATION, a corporation, *et al.*,

Appellees.

Appeal From the United States District Court
Central District of California.

APPELLANT'S REPLY BRIEF TO BRIEF FOR
APPELLEE THE ATTORNEY GENERAL
OF CALIFORNIA

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OF CALIFORNIA

REPLY TO BRIEF OF ATTORNEY GENERAL

The Attorney General of California does not question the contention of the plaintiff that a trust cannot be established to exist in perpetuity for both charitable and non-charitable purposes. The Attorney General, however, takes issue with the legal effect of paragraph 2 of the 1937 Indenture of Trust, which provides that one of the purposes of said trust is that the trustee may invest all or any portion of the balance of the income received by said trustee from the dividends on the Irvine Company stock after the payment of administration expenses and the

replacement of losses to corpus. The Attorney General attempts to define this express mandate of the trustor for the diversion of trust income for private uses as not constituting a noncharitable purpose. There is no limitation imposed on the trustee as to what percentage of the balance of said trust income may be invested and thereupon frozen into the corpus of the trust estate.

The basic and vital objection of the plaintiff to the investment provision in paragraph 2 is that there is no fixation of a definite percentage of the trust income which may be devoted to the noncharitable investment purposes, but it is left to the absolute discretion of the trustee as to what percentage of the balance of said income, if any remains after said investment purposes have been fulfilled, shall be received and devoted by the trustee for wholly charitable purposes. A valid provision would require that the trustee be limited to a reasonable definite percentage of said trust income for such investments or additions to capital. A comparison of the investment provisions in paragraph 2, which is invalid and renders the entire Irvine trust void, with a provision which is valid, is set forth in the indenture of trust of the Duke Endowment Foundation, and which will be found in the case of *Norman A. Cooke, et al. v. Duke University, et al.* 200 North Carolina 1. The investment provision in the Duke Endowment Foundation indenture of trust limits the diversion of the trust income for investment purposes and additions to capital to 20% thereof, and further provides that such income investment use shall terminate after the amount of 40 million dollars has been reached. No such limitation in any percentage or maximum amount is placed upon the trustee in paragraph 2 of the Irvine Indenture of Trust. Furthermore, the Duke Endowment Fund trustees are also limited in the character of investments to the securities of the the Duke Power Co., or in

bonds issued by the United States of America, or by a state thereof, or by a district, county, town or city. No restriction of any kind is placed on the trustees of the Irvine Foundation with reference to the character of investments.

Under the law as established in California, it makes no difference whether the trustee may devote all or any part of the trust income for noncharitable purposes, for it is mandatory that the trustee shall have no option to devote any part of the trust income to any purposes which are not wholly charitable.

The rule that a discretion given to trustees to use trust property for charitable purposes and also for noncharitable purposes makes the trust invalid is supported by the following cases which are discussed in the brief for the appellant: *Estate of Hinckley*, *Estate of Sutro*, *Estate of Vance*, *Estate of Klein*, and *Estate of Peabody*.

In the *Estate of Sutro*, the trustor requeathed land in trust to be conveyed by his executors to a board of trustees and thereafter to be sold and after the death of trustor's children to be applied "by said board of trustees for such charities, institutions of learning, and science and for premiums to be set apart for distinguished scholarships and scientific discovery and inventions as shall be directed by my executors."

Under the provisions of the 1937 Irvine Indenture of Trust, the foundation trustee is required or permitted to invest all or any portion of the income received from the Irvine Company stock dividends after the payment of expenses of administration and making good any losses to corpus in any property or securities which the trustee shall determine proper or advisable whether or not permissible by law as investment for trust funds, and any property which is acquired by the trustee from the

balance of said income after the payment of expenses of administration and the replacement of losses to corpus, shall be managed, controlled, improved, encumbered by mortgage, trust deed, or otherwise, at such times and on such terms as the board of directors of the trustee may in its discretion deem advisable.

Said Irvine Indenture of Trust further provides, "All discretions in this trust conferred upon the trustee shall unless specifically limited, be absolute and uncontrolled, and their exercise by the Board of Directors of the Trustee conclusive on all persons interested in this trust."

Obviously, the Attorney General of California has no authority or power to vacate or ignore this mandatory provision which gives the Irvine Foundation trustee uncontrolled discretion to invest any or all of the balance of said income in any property or securities or mortgages or anything else that pleases said trustee. Neither has said Attorney General any regulatory authority or jurisdiction of any kind over the Irvine charitable trust or any other charitable trust or charitable corporation in California.

Said permissible noncharitable investment use of the balance of said income, as provided in paragraph 2, further provides that the income and profits received from such noncharitable private investments, "shall thereafter be used, applied, and devoted as in this trust provided." It is therefore clear that this provision authorizes the trustee to continue to divert the income of said noncharitable private investments into other noncharitable private investments and not to exclusively devote such recurring investment income to wholly charitable purposes.

Under the foregoing provisions of said Irvine indenture of trust the trustee could devote the said balance of said income to acquiring a private school or any other private institution or enterprise through the incorporation thereof and the purchase of its stock or through mortgage loans or by acquiring the outright conveyance by said institution or corporation of all of its assets to the foundation trustee and the foundation trustee thereupon would manage and control the operation of said private noncharitable institution or corporation, which would be in violation of the law which is applicable to charitable trusts.

In the *Estate of Sutro*, the Supreme Court of California further stated as follows:

“The fatal objection to the validity of the trust is that it authorizes the funds to be devoted to purposes other than charitable and that it leaves the question whether it is to be devoted to charitable purposes, or to other uses not charitable, entirely in the discretion of the executors, or, in the case of their default, in the discretion of the board of trustees.”

The Supreme Court further stated:

“Without violating the directions of the will the entire fund could be devoted to institutions of learning and science carried on for private gain, of which there are many, or to the encouragement of abstract scientific discoveries not tending to benefit mankind, or to reward inventions calculated to profit the investor alone, or those to whom he should transfer his secret or patent. The trustees could apply a part to each of the different objects, or they could apply the whole of it to one of them to the exclusion of any other. These objects not being exclusively or necessarily charitable, it follows, under the rule

stated, that the entire trust was invalid, and that the decree of distribution was correct * * *”.

The foregoing application of the law by the Supreme Court of California in the *Sutro* case is clear and unambiguous and under said law the investment provisions contained in paragraphs 2 and 3 of the Irvine indenture of trust which permit the foundation trustee to use all or a portion of the income received from the dividends on the Irvine Company stock for investments devoted to the same or similar noncharitable purposes which are described in the *Sutro* case, renders said Irvine trust illegal and void. There is absolutely no difference whatever between the noncharitable provisions contained in paragraphs 2 and 3 of the Irvine indenture of trust concerning the uncontrolled discretionary powers of said foundation trustee and the similar provisions which are contained in the *Sutro* will that permitted the trustees to devote a part of the trust funds to noncharitable purposes. The Supreme Court of California held that whether or not the *Sutro* trustees carried out said noncharitable provisions that were contained in the *Sutro* will was irrelevant as the inclusion of said provisions rendered the *Sutro* trust illegal and void, and the same rule of law applies to the invalid and illegal investment provisions in the Irvine indenture of trust.

In the case of *Wilkin v. Wilkin Trust*, 261 F.Supp. 977, the court stated:

“The cases relied upon by plaintiff on this point (noncharitable and mixed trust provisions) are those which on the face of the trust instrument involved there is a mixed trust established, that is, one wherein the trustees are specially directed or permitted to use trust funds to either charitable or noncharitable recipients, or both. If such specific directions

or permission appeared on the face of this trust instrument those cases would be followed.”

The cases referred to in the *Wilkin* case are the California cases of *Estate of Sutro*, *Estate of Klein*, *Estate of Vance*, and *Estate of Peabody*, which have all been discussed in the brief for appellant.

Furthermore, the Attorney General of California has no authority whatever to inject his office into the plaintiff's action by taking the side of the Irvine Foundation. There is no provision in any law in California which entitles the Attorney General to become other than a neutral party to any litigation which involves the validity of the Irvine indenture of trust which is the basis of plaintiff's action. The only jurisdiction or authority that is vested in the Attorney General is to file an action in court against the trustees of a charitable corporation or charitable trust where said trustees were guilty of maladministration of the charitable trust funds.

Similar activity to that which has been improperly undertaken by the office of the California Attorney General in his opposition to the plaintiff's action has recently been severely criticized by Congressman Wright Patman, Chairman of the Committee on Banks and Currency of the House of Representatives, United States Congress, for attempting to interfere with the Commissioner of Internal Revenue Service of the United States in connection with the collection of a federal income tax assessment in the sum of approximately \$300,000 against a California foundation that was charged by said commissioner with illegal activities in violation of the internal revenue laws. The letter of Mr. Patman to said California Attorney General was referred to by the Los Angeles Times on August 7, 1968, and in this letter Mr. Patman accused Deputy Attorney General Wallace Howland, who is in charge of the supervision of the internal trustee

administration of charitable corporations and trusts in California with "serious dereliction of your official duty", for trying to save the illegal California foundation federal taxes rather than collecting California state taxes that should also be due for the same illegal activities that were charged against said California foundation by the Commissioner of Internal Revenue.

The contention of the defendant Foundation that said noncharitable private investment use of the trust income which is contained in paragraph 2 of said Irvine indenture of trust is merely a provision for the accumulation of income, is absurd. Said provision expressly states that when the income is invested by the trustee said investment, which could be a private institution or any other noncharitable enterprise, shall become a part of the corpus or principal of the trust property. Therefore, said noncharitable investment, when made, would forever lose their identity as income, accumulated or otherwise, and would forever be unavailable for charitable distribution as the Irvine trust is solely an income trust and the corpus of said trust can never be distributed.

Furthermore, under Section 501 of the Internal Revenue Act which prohibits a tax-exempt charitable foundation trust from accumulating its income and requires said trust to distribute all of its income currently for charitable purposes, the attempted construction placed on said paragraph 2 by the defendant Foundation would render the trust illegal and void. See the case of *Danforth Foundation v. United States*, 347 F.2d 673.

Respectfully submitted,

LYNDOL L. YOUNG

*Attorney from
Plaintiff-Appellant
Athalie Irvine Smith*

NO. 22607

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 24 1969

ATHALIE IRVINE SMITH,

Appellant,

vs.

THE JAMES IRVINE FOUNDATION,
a corporation, et al.,

Appellees.

Appeal from the United States District Court
Central District of California

PETITION FOR REHEARING

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ATHALIE IRVINE, SMITH,)
)
 Appellant,)
)
 vs.)
)
 THE JAMES IRVINE FOUNDATION,)
 a corporation, et al.,)
)
 Appellees.)
 _____)

Appeal from the United States District Court
Central District of California

PETITION FOR REHEARING

To the Honorable John C. Pickett, Austin L. Staley
and Warren L. Jones, Circuit Judges:

Appellant, Athalie Irvine Smith, hereby petitions
for a rehearing to reconsider the judgment entered in this
action on October 14, 1968, on the following grounds:

1. The judgment entered herein by the District
Court and the judgment of the Court of Appeals affirming
the judgment of said District Court and entered herein
on October 14, 1968, was and is void for want of juris-
diction and due process because of the absence of an

1 indispensable party to plaintiff's action, to wit: James
2 Myford Irvine, who was born in 1953, and is an heir at law
3 of the trustor James Irvine, deceased, who was the grand-
4 father of said minor.

5 2. The judgment of the District Court and the judg-
6 ment of the Court of Appeals violates the due process clause
7 contained in the Fifth and Fourteenth Amendments to the
8 United States Constitution. The judgment of the Court of
9 Appeals must therefore be vacated and the judgment of the
10 District Court must likewise be vacated, reversed, and re-
11 manded to the District Court with instructions to grant the
12 plaintiff a new trial and with further instructions to
13 appoint an independent guardian ad litem for the minor heir
14 at law, James Myford Irvine, who is an indispensable party
15 to the plaintiff's action. Rule 17 (c) F.R.C.P.

16 Other grounds for granting said petition for re-
17 hearing will be hereinafter set forth:

18 1. James Myford Irvine was born in the year 1953 and was a
19 minor of the age of 13 years when the plaintiff filed her
20 action herein on August 10, 1966. As hereinabove stated,
21 James Myford Irvine is an heir at law of the trustor, James
22 Irvine, deceased, who was the grandfather of said minor.
23 James Irvine, deceased, died on August 24, 1947. The father
24 of the minor James Myford Irvine was Myford Irvine, deceased,
25 a son of the trustor, James Irvine, deceased. Myford Irvine
26 died on January 11, 1959. The minor James Myford Irvine was

1 and is an indispensable party to plaintiff's action as an
2 heir at law of the trustor James Irvine. A guardian ad litem
3 should have been appointed by the District Court for said
4 minor and joined as an indispensable party to plaintiff's
5 action in the order of the District Court joining certain
6 indispensable parties to said action, which was filed by
7 said court on March 30, 1967. Said order joined Linda Irvine
8 Gaede, a sister of said minor and a granddaughter of the
9 trustor, James Irvine, as a party defendant in said action
10 because said Linda Irvine Gaede as an heir at law of the
11 trustor James Irvine was an indispensable party to said action.
12 Likewise, said minor heir at law, James Myford Irvine, who
13 stood in exactly the same relationship to the trustor, James
14 Irvine, as his sister Linda Irvine Gaede, should have been
15 included in said order of said District Court as an indis-
16 pensable party to said action. He was not. Therefore, the
17 District Court was without jurisdiction to proceed to the
18 trial of said action or to enter a judgment therein and said
19 judgment of said District Court is therefore void and the
20 judgment of the Court of Appeals which affirmed the judgment
21 of said District Court is likewise void.

22 Plaintiff's original Complaint alleged in paragraph
23 8, page 3 thereof, that the plaintiff and Katharine Irvine
24 Wheeler, Linda Irvine Gaede, and James Myford Irvine were
25 the granddaughters respectively and the grandson of the
26 trustor, James Irvine, and were also the only heirs at law

1 of said James Irvine.

2 In paragraph 17, page 6 of said original Complaint,
3 the plaintiff alleged, "That because of the invalidity of
4 said instrument entitled 'Indenture of Trust' as hereinabove
5 alleged, the defendant, The James Irvine Foundation, and the
6 individual defendants named herein as the members and dir-
7 ectors thereof, now hold the title to the said 459 shares of
8 stock of The Irvine Company and all dividends, capital gains,
9 liquidating dividends, and all other property derived there-
10 from on a resulting trust for the heirs at law of said James
11 Irvine, deceased."

12 During the hearing before the District Court on the
13 motion of defendant Foundation for summary judgment or dis-
14 missal of plaintiff's original Complaint and because of the
15 contention of said defendant Foundation that the defendant
16 as an heir at law of the trustor James Irvine did not have
17 capacity to file her action herein and the District Court
18 upon the request of plaintiff's counsel made an order which
19 authorized the plaintiff to file an amended complaint herein
20 to allege her status not only as an heir at law of the
21 trustor James Irvine but also to show her status as a bene-
22 ficiary, devisee and legatee under the Will of her grand-
23 father, James Irvine, deceased. Accordingly, said Amended
24 Complaint was filed on January 16, 1967, and contained the
25 following allegation in paragraph 19, page 9 thereof:
26 "Plaintiff brings this action as an heir at law of her

1 grandfather, James Irvine, deceased. Plaintiff also brings
2 this action as a beneficiary, devisee, and legatee under the
3 Will of her grandfather, James Irvine, deceased."

4 R. p. 12.

5 Said Amended Complaint further alleges as did plain-
6 tiff's original Complaint that James Myford Irvine was an
7 heir at law and a grandson of the trustor James Irvine.

8 R. pp. 6-7.

9 Plaintiff in said Amended Complaint also alleged in
10 paragraph 17, page 6 thereof, "That because of the invalidity
11 of said instrument entitled, 'Indenture of trust,' as here-
12 inabove alleged, that defendant, The James Irvine Foundation,
13 and the individual defendants named therein as the trustees,
14 members and directors thereof, now hold the 459 shares of
15 stock of The Irvine Company and all dividends, capital gains,
16 liquidating dividends, and all other property and fruits
17 derived therefrom on a resulting trust for the heirs at law
18 of the said James Irvine, deceased, and/or the beneficiaries,
19 devisees and legatees of the Will of James Irvine, deceased."

20 R. p. 9.

21 Said Amended Complaint in the second cause of action
22 therein for declaratory judgment and in paragraph 3, page 22
23 of said Amended Complaint, alleged that the plaintiff claims
24 for herself as an heir at law of the said James Irvine,
25 deceased, and/or as a beneficiary, devisee, and legatee under
26 the Will of James Irvine, deceased, that the said 459 shares

1 of The Irvine Company stock was not owned by the defendant,
2 The James Irvine Foundation, but that said 459 shares of
3 stock is owned by the heirs at law of the said James Irvine,
4 deceased, under the laws of succession and intestacy of the
5 State of California and/or as beneficiaries, devisees, and
6 legatees and that the plaintiff's share of said 459 shares of
7 stock of The Irvine Company is 153 shares thereof. R. pp.25-26

8 It is therefore clear from the plaintiff's original
9 Complaint as well as her Amended Complaint that the plain-
10 tiff's action is based upon the principle of law that because
11 of the invalidity of the 1937 Indenture of Trust that the
12 defendant Foundation as trustee holds the 459 shares of
13 Irvine stock for the heirs at law of the trustor, James
14 Irvine, deceased. The Supreme Court of California in the
15 case of Davenport v. Davenport Foundation, 222 P. 2d 11,
16 32 C. 2d 67, which was an action to invalidate an inter vivos
17 trust upheld this principle of law upon which plaintiff's
18 action is based. Further similar and applicable California
19 authorities are:

20 Booge v. Reinicke, 114 P.2d 427, 45 C.A.2d 60;
21 In re Estate of Walkerly, 41 P. 772, 108 Cal. 627; Campbell-
22 Kawannanakoia v. Campbell, 92 P.184, 152 Cal. 201; In re
23 Whitney's Estate, 167 P. 399, 176 Cal. 12; In re Maltman's
24 Estate, 234 P. 898, 195 Cal. 643; Estate of Van Wyck, 196 P.
25 50, 185 Cal. 49; In re Estate of Bailess, 51 Cal.Rptr. 850;
26 Atlantic Nat.Bk. of Jacksonville, Fla. v. St. Louis Union Tr.

1 Co., 221 S.W.Rptr. 2d 2.

2 The judgment of the District Court entered herein on
3 December 18, 1967, states as follows: "4. That none of the
4 heirs at law of James Irvine and none of the beneficiaries
5 under his Will have any right or title to, or any interest
6 in those shares." (The 459 shares of Irvine stock which are
7 the subject of plaintiff's action). It is therefore clear
8 that said judgment of the District Court excludes and
9 prejudices the rights of said minor, James Myford Irvine,
10 as an heir at law of the trustor James Irvine with reference
11 to said minor's share as such heir of said 459 shares of the
12 stock of The Irvine Company when the District Court never
13 had jurisdiction over the person of said minor as an indis-
14 pensable party to plaintiff's action.

15 The judgment entered herein by the District Court
16 contains the following statement: "The stock involved (459
17 shares of The Irvine Company) constitutes the majority of
18 The Irvine Company. (Total shares issued 855). That cor-
19 poration has large assets. Its largest asset is a tract of
20 land known as the Irvine Ranch. That ranch consists of
21 approximately 88,000 acres of land in Orange County, Calif-
22 ornia. It is in the metropolitan area of Los Angeles.
23 Estimates of the present value of the ranch range from one-
24 half billion dollars to a billion and one-half dollars."
25 R. 139. The stake of the minor heir at law, James Myford
26 Irvine, in the successful outcome of plaintiff's action would

1 be the value of his share of said 459 shares of Irvine stock,
2 to wit, 76 1/2 shares thereof and his sister Linda Irvine
3 Gaede would also receive 76 1/2 shares of said Irvine stock.
4 On the basis of the estimated value of the Irvine Ranch as
5 stated by the District Court as hereinabove mentioned, said
6 76 1/2 shares of Irvine stock would have a minimum value of
7 approximately 38 million dollars and a maximum value of 114
8 million dollars. It is therefore obvious that said minor
9 heir at law, James Myford Irvine, has a substantial interest
10 in the subject matter and controversy that is involved in
11 the plaintiff's action and that said minor heir at law was
12 and is entitled to be joined as an indispensable party to
13 plaintiff's action through an independent guardian ad litem
14 who would be required to employ an independent attorney who
15 would vigorously assert and protect the rights of said minor
16 and who would not be associated with or controlled by any of
17 the attorneys for the defendants in this action.

18 On February 22, 1967, the District Judge denied the
19 motions of the defendant Foundation for summary judgment or
20 dismissal and thereupon the defendant Foundation and the
21 defendant Kate L. Wheeler made an application for an order
22 joining parties defendant (FRCP Rules 12, 21) together with
23 a memorandum of points and authorities and affidavit of
24 Howard J. Privett in support thereof. Said application
25 was exparte and was mailed to the District Judge who was on
26 said date sitting on the District Court in San Antonio,

1 Texas by assignment. Said application stated: "This
2 application is made upon the ground that each said proposed
3 party defendant is a proper and necessary or indispensable
4 party to this action and that the joinder of said parties is
5 required to fully and finally resolve the pending controversy
6 and to avoid subjecting those who are already parties herein
7 to a substantial risk of a multiplicity of actions possibly
8 involving inconsistent results. The proposed new parties,
9 and each of them, can be joined herein as defendants without
10 depriving this court of jurisdiction and each proposed new
11 party is subject to the jurisdiction of this Court as to both
12 services of process and venue." The names of each of said
13 proposed parties to be joined as a defendant upon the ground
14 that each of said parties was a proper and necessary or in-
15 dispensable party to said action was Linda Irvine Gaede,
16 granddaughter of the trustor, James Irvine, and therefore an
17 heir at law of James Irvine. The other parties were Gloria
18 Wood Irvine, the wife of Myford Irvine, but not an heir at
19 law of the trustor James Irvine and not the mother of Linda
20 Irvine Gaede. Connected with the joinder of Gloria Wood
21 Irvine was the Security First National Bank, who with Gloria
22 Wood Irvine was an executor and trustee of the estate of
23 Myford Irvine, deceased. The remaining parties were William
24 Thornton White, Jr., as executor of the estate of Katharine
25 Brown Irvine, deceased, and the Attorney General of the
26 State of California.

1 In said Memorandum of Points and Authorities in
2 support of said motion to join certain persons as defendants,
3 the following representation was made to the District Court:
4 "The plaintiff has failed to name or join as parties defendant
5 in this action heirs at law of James Irvine, deceased, bene-
6 ficiaries of the estate of James Irvine, deceased, each of
7 whose interests are adverse (false) to those of plaintiff
8 (false) and will be affected (prejudiced) by any judgment
9 entered herein." Said Memorandum of Points and Authorities
10 contain the further statement: "The plaintiff brings this
11 action as an heir at law of James Irvine, deceased, and as
12 a beneficiary, devisee, and legatee under the Will of James
13 Irvine, deceased."

14 Under the Will of James Irvine, deceased, and in
15 Article Fifth, paragraph F, subparagraph 2 thereof, the
16 plaintiff is a residuary devisee and legatee and is entitled
17 to the distribution of one-third of any property that comes
18 into the estate of James Irvine, deceased, subsequent to the
19 distribution of said estate to the testamentary trustees who
20 are named in said Will and said residuary provision would
21 include the 459 shares of stock of The Irvine Company that
22 is held by the defendant Foundation on a resulting trust in
23 the event said Irvine stock became a part of the said estate,
24 as a result of plaintiff's action. Said Irvine stock would
25 be distributed outright to plaintiff and the other heirs at
26 law of James Irvine, deceased, and would not be subject to any

1 of the trust provisions of the Will of said decedent.

2 Plaintiff further contended and the substantial
3 evidence introduced at the trial disclosed that James Irvine
4 died intestate as to the 459 shares of Irvine stock and
5 therefore the plaintiff and the other heirs at law of James
6 Irvine would be entitled to the distribution of said stock
7 as such heirs and the same would not come under the trust
8 provisions of the Will of James Irvine, deceased. However,
9 none of these issues were considered by the District Court
10 and no findings thereon were made by the District Court.

11 Said joinder memorandum further stated: "Plaintiff's
12 position in the action is in direct conflict with the in-
13 terests of the other persons who are heirs at law and/or
14 beneficiaries under the estate of James Irvine, deceased."

15 (False). "A judgment herein would necessarily affect the
16 rights of said persons (true) and if they are not joined as
17 parties, the persons who are already parties would be sub-
18 ject to a substantial risk of a multiplicity of actions
19 involving the same subject matter with possibly inconsistent
20 results. (True). It is therefore necessary and proper that
21 said parties be joined herein as parties defendant.

22 Bank of California v. Superior Court, 16 Cal 2d 516, 106 P
23 2d 879. The same rule applies in the federal courts. Beard
24 v. Peoples Bank and Trust Co. of Westfield, 120 F.2d 1001
25 (3rd Circuit 1941); Warner v. First National Bank of Minne-
26 apolis, 236 F.2d 853 (8th Circuit 1956); Certiorari denied

1 352 U.S. 927."

2 Said memorandum contained the further statement:

3 "Plaintiff is on record as having no objection to the pro-
4 posed parties defendant who are necessary parties to this
5 action (including Linda Irvine Gaede and the minor heir at
6 law, James Myford Irvine) and has acknowledged that their
7 joinder may be ordered without the necessity of a hearing
8 as appears in the following extract from the reply of plain-
9 tiff to answers of all defendants to the Amended Complaint
10 except The Irvine Company." To wit:

11 "The plaintiff has heretofore indicated to the court
12 the plaintiff has no objection to the joining in this action
13 of any parties whose interests are involved in said action
14 and may be affected by any judgment entered herein and who
15 appear to the court to be necessary or indispensable parties
16 to this action as provided in Rules 19 and 21 of the Federal
17 Rules of Civil Procedure whenever the court shall determine
18 of its own motion that said parties, who ever they may be,
19 shall be so joined." Emphasis added, p.16, 1.11-18, Plain-
20 tiff's Reply to Answers of said Defendants. R.101.

21 The Affidavit of Howard J. Privett referred to in
22 said joinder motion contained the following statement: "2.
23 That the records, pleadings and files herein disclose that
24 Linda Irvine Gaede is an heir at law of James Irvine, de-
25 ceased, and a beneficiary of the estate of James Irvine,
26 deceased."

1 Having represented to the District Court that it was
2 necessary to join Linda Irvine Gaede, who was an heir at
3 law of James Irvine, deceased, and therefore an indispensable
4 party to plaintiff's action and not to join her minor brother
5 James Myford Irvine, who was also an heir at law of James
6 Irvine, deceased, indicated that there was some reason why
7 the defendant Foundation and the defendant Kate L. Wheeler,
8 as the moving parties, did not intend that the minor heir
9 at law, James Myford Irvine, be made an indispensable party
10 as a defendant to plaintiff's action the same as his sister
11 Linda Irvine Gaede was. However, the reason for doing so
12 is obvious. Said defendants did not intend that said minor
13 heir at law, James Myford Irvine, would become a party to
14 this proceeding because to do so would have required the
15 court to appoint a guardian ad litem for said minor heir at
16 law and also to appoint said guardian ad litem's attorney
17 in order that the rights and interests of said minor heir at
18 law would be faithfully and adequately protected. All of
19 the other parties defendant who were brought into said action
20 on said joinder motion (except the defendant Linda Irvine
21 Gaede) as well as the original parties who were named in the
22 original Complaint and the Amended Complaint of the plaintiff
23 were and are hostile and adverse to the rights and interest
24 of said minor heir at law and for that reason they too did
25 not intend that said minor heir at law would be represented
26 in plaintiff's action by an independent guardian ad litem

1 and by an independent attorney who would not be subject to
2 the control of said other defendants and their attorneys.

3 The record in this case, including the briefs filed
4 by said activist defendants conclusively established the
5 hostile and adverse position of said defendants not only
6 against the claims of the plaintiff but also against the con-
7 stitutional rights and interests of said minor heir at law,
8 James Myford Irvine. It therefore appears that the failure
9 to join said minor heir at law, James Myford Irvine, as an
10 indispensable party to plaintiff's action was both sinister
11 and ulterior. There can be no other explanation for said
12 willful failure to do so in the face of the inclusion in said
13 joinder motion of Linda Irvine Gaede as an indispensable
14 party to plaintiff's action and the deliberate exclusion of
15 her brother and minor heir at law, James Myford Irvine.

16 There is only one trust involved in plaintiff's
17 action and that is the resulting trust that arises as a
18 matter of law because the trust created by the 1937 Indenture
19 of Trust is invalid and void. The defendant Foundation and
20 the individual defendant directors and trustees of said
21 defendant Foundation, as the trustees of said resulting
22 trust, hold the 459 shares of Irvine stock on a resulting
23 trust and not as trustee under the Irvine Indenture of Trust.
24 The beneficiaries and the only beneficiaries of said re-
25 sulting trust are the heirs at law of James Irvine, deceased,
26 to wit: Athalie Irvine Smith, the plaintiff, Katherine

1 Lillard Wheeler, a defendant, Linda Irvine Gaede, a defendant,
2 and the minor heir at law, James Myford Irvine, who should
3 be joined as an indispensable party to plaintiff's action
4 but who was not for the reasons hereinabove stated. Neither
5 the estate of James Irvine, deceased, or the estate of his
6 widow, Katharine Brown Irvine, deceased, or Gloria Wood
7 Irvine and Security First National Bank, as executors and
8 trustees of the estate of Myford Irvine are beneficiaries
9 of this resulting trust.

10 There is no reason why the District Court or this
11 court should not have observed from the disclosures made by
12 the plaintiff in both her Complaint and Amended Complaint
13 and in her briefs filed with both the District Court and
14 this court that the status of the minor heir at law, James
15 Myford Irvine, required said District Court and this court
16 to take appropriate action which would have resulted in
17 making said minor heir at law a party to this action.
18 Having failed to do so, and having been misled through the
19 fraudulent acts and conduct of said activist defendants
20 as hereinabove mentioned, the judgment entered by the Dis-
21 trict Court and the judgment entered by this court are both
22 void and therefore the judgment of the District Court must
23 be vacated, reversed, and remanded to the District Court
24 for a new trial with instructions to said District Court
25 to appoint an independent guardian ad litem and an indepen-
26 dent attorney for said guardian ad litem who will vigorously

1 assert and protect the constitutional rights of said minor
2 heir at law, James Myford Irvine, to due process of law and
3 to have his day in court.

4 The opinion of the Court of Appeals for the Third
5 Circuit in the case of Provident Tradesmens Bank & Trust Co.
6 etc., v. Lumbermens Mutual Casualty Company, etc., reported
7 in Volume 365 F.2d 802, contains a comprehensive legal
8 treatise covering many federal cases involving the law that
9 is applicable to the record facts in the plaintiffs case
10 which required the mandatory joinder of said minor heir at
11 law, James Myford Irvine, as an indispensable party to
12 plaintiff's action. In the appendix to this Petition for
13 Rehearing, there is set forth certain verbatim portions of
14 said opinion of the said Court of Appeals for the Third
15 Circuit which enumerates and quotes from said applicable
16 federal cases.

17 The plaintiff is aware of the decision of the
18 United States Supreme Court in the above case which is
19 reported in 19 L.Ed. 2d 936 and the criticism of the Supreme
20 Court concerning the opinion of the Court of Appeals in said
21 case. The Supreme Court vacated the judgment of the Court of
22 Appeals and remanded the case to the Court of Appeals for
23 its consideration of certain issues raised on the appeal
24 from the District Court which said opinion of the Supreme
25 Court stated were not considered by the Court of Appeals.
26 Judge Staley was a member of the en banc panel that heard

1 this appeal and Judge Staley is therefore familiar with both
2 opinions. However, the Supreme Court in its lengthy opinion
3 did not overrule or criticize any of the cases applicable
4 to the law concerning the joinder of indispensable parties
5 as provided in Rule 19 FRCP but to the contrary the Supreme
6 Court approved all of said federal authorities which were set
7 forth in said opinion of the Court of Appeals and which
8 have been referred to and quoted from in this Petition for
9 Rehearing. What the Supreme Court criticized in the opinion
10 of the Court of Appeals for the Third Circuit was that said
11 court failed to apply Rule 19's criteria to the facts of the
12 case that was under consideration by said Court of Appeals
13 and that if it had done so, said Court would not have
14 reached the conclusions it did. The facts established by
15 the substantial evidence in plaintiff's case clearly dis-
16 close the status of said minor heir at law as an indispen-
17 sable party to plaintiff's action and therefore the federal
18 cases cited in the opinion of the said Court of Appeals as
19 well as the other cases which are cited in the notes appended
20 to the opinion of the Supreme Court clearly affirm that the
21 failure to name the minor heir at law, James Myford Irvine,
22 as an indispensable party to plaintiff's action renders the
23 judgment of the District Court and the judgment of this
24 court void and requires that both of said judgments be
25 vacated and that the judgment of the District Court be
26 reversed and remanded for a new trial.

1 In addition to the federal cases cited in the opinion
2 of the Court of Appeals for the Third Circuit and in the
3 opinion of the Supreme Court, the following federal cases
4 support the plaintiff's Petition for Rehearing, to wit:

5 Wesson, et al. v. Crain, 8th Circuit, 165 F.2d 6;
6 Division 525, Order of Railway Conductors of America v.
7 Gorman, 8th Circuit, 133 F.2d 273; Stevens v. Loomis, 1st
8 Circuit, 334 F.2d 775; Cummings v. Redeeriaktieb Transatlantic
9 3rd Circuit, 242 F.2d 275; Haby v. Stanolind, 5th Circuit,
10 225 F.2d 723; Brown v. Christman, 126 F.2d 625.

11 Two cases of the Court of Appeals for the 9th
12 Circuit that have a direct bearing on the plaintiff's
13 Petition for Rehearing are McShan v. Sherrill, 233 F.2d 462
14 and The Dredge Corporation v. Penney, 338 F.2d 456. The
15 Court of Appeals for the 9th Circuit in both of said cases
16 held that the failure to join an indispensable party can be
17 raised at any time, even by the Court of Appeals on its own
18 motion.

19 The Supreme Court in its opinion in the Provident
20 case stated that the mandatory duty which is imposed by the
21 law on a Court of Appeals involving the absent indispensable
22 party such as the minor heir at law, James Myford Irvine,
23 is as follows:

24 "When necessary, however, a court of
25 appeals should, on its own initiative, take
26 steps to protect the absent party, who of

1 course had no opportunity to plead and prove
2 his interest below." ⁸ Pages 945, 946.

3 Footnote 8, page 946, reads as follows:

4 "8. E. g., Hoe v. Wilson, 9 Wall 501, 19
5 L ed 762. See generally 2 Barron & Holtzoff,
6 Federal Practice & Procedure § 516 (1966 Supp)
7 (Wright ed)."

8 It is therefore clear that both of the above authori-
9 ties referred to by the Supreme Court in footnote 8 are
10 approved by the Supreme Court. We have already quoted from
11 the case of Hoe v. Wilson. (Appendix). That portion of
12 § 762, Barron & Holtzoff that is applicable to plaintiff's
13 Petition for a Rehearing reads as follows:

14 "§516. Effect of Failure to Join; Juris-
15 diction as Affected by Joinder.

16 In considering what action an appellate
17 court should take when it is urged to vacate the
18 proceedings below and to dismiss for want of
19 an indispensable party, three situations must
20 be distinguished. (1) The judgment purports
21 to affect prejudicially the interest of an
22 absent indispensable party, and the objection
23 is raised for the first time on appeal. * * *

24 "In situation (1) the action must be dis-
25 missed, or remanded to bring in the absent
26 parties. This is the classic illustration

1 of the rule that the objection of failure to
2 join an indispensable party may be raised
3 for the first time on appeal." 34.1a * * *

4 (The footnote 34.1a reads as follows: "This was
5 the situation in the leading case of Hoe v. Wilson, 1870,
6 76 U.S. (9 Wall.) 501, 19 L.Ed. 762. See also McShan v.
7 Sherrill, C.A.9th, 1960, 283 F.2d 462)".

8 "The results in these situations must be
9 considered in terms of the purposes of the com-
10 pulsory joinder rule. That rule is intended to
11 protect the absentee from prejudice. * * * For
12 the first of these purposes, timely objection of
13 the parties is immaterial. If the absentee
14 will otherwise suffer prejudice, the court must
15 act on its own to protect him, and this is why
16 the appellate court must reverse in situation
17 (1)."

18 The plaintiff by the disclosure in her original
19 Complaint and her Amended Complaint and in her briefs filed
20 with the District Court after the trial in said court
21 brought to the attention of said District Court the names of
22 all of the heirs at law of James Irvine, deceased, and who
23 were also beneficiaries, devisees and legatees under the
24 Will of said deceased, including the minor heir at law,
25 James Myford Irvine. In the Reply filed by the plaintiff
26 to the affirmative defenses contained in the answers of the

1 activist defendants, the plaintiff alleged as set forth in
2 the Memorandum of Points and Authorities to the joinder
3 application of the defendant Foundation and the defendant
4 Kate L. Wheeler that the plaintiff had no objection to the
5 joining in plaintiff's action of any parties whose interests
6 were involved in said action and that may be affected
7 (prejudiced) by any judgment entered therein and who appear
8 to the District Court to be necessary or indispensable
9 parties to said action as provided in Rule 19 FRCP whenever
10 said court should determine of its own motion that said
11 parties, who ever they may be shall be so joined. R. 101.

12 It was, therefore, the duty of said District Court
13 to know from the allegations and disclosures contained in
14 said pleadings and said briefs of the existence of said
15 minor heir at law, James Myford Irvine, and that it was
16 mandatory for said District Court of its own motion to join
17 said minor heir as an indispensable party to the subject
18 matter and the controversy which was contained in plaintiff's
19 original Complaint and Amended Complaint.

20 The District Court and this court were also
21 charged with notice from the transcript of record in this
22 case, including the 16 volumes of the reporters transcript
23 and the briefs filed by the plaintiff that all of the
24 activist defendants hereinabove mentioned who appeared in
25 said action conclusively demonstrated by their pleadings,
26 arguments and briefs filed in the District Court and in

1 this court that all of said activist defendants were not
2 only hostile and adverse to the constitutional rights
3 and interest of said minor heir at law, James Myford Irvine,
4 in the subject matter and controversy contained in plain-
5 tiff's action but further that said hostile and adverse acts
6 by said defendants were the result of collusion and connivance
7 between said activist defendants which conclusively demon-
8 strated that none of said defendants protected or intended
9 to protect the constitutional rights to due process and the
10 interest of said minor in the subject matter and controversy
11 set forth in plaintiff's Complaint and Amended Complaint.
12 It therefore appears from the record in this case that said
13 activist defendants deliberately, willfully, and fraudulently
14 excluded said minor heir at law, James Myford Irvine, from
15 appearing and protecting his interests in plaintiff's action
16 through a court appointed guardian ad litem. The defendants,
17 N. Loyall McLaren and Robert H. Gerdes, who were named as
18 original defendants in plaintiff's action as members, dir-
19 ectors and trustees of the defendant Foundation and who were
20 further joined as defendants in said action pursuant to
21 their application as executors and trustees of the estate of
22 James Irvine, deceased, fraudulently betrayed and abandoned
23 their fiduciary trustee responsibility to said minor and
24 assumed a hostile, adverse and fraudulent conflict of interest
25 position towards said minor to whom they owed a trustee
26 fiduciary responsibility as a matter of law. Said defendants

1 N. Loyall McLaren and Robert H. Gerdes subordinated their
2 fiduciary duty which they owed said minor as trustee of the
3 estate of James Irvine, deceased, to their predominant
4 conflict of interest status as members, directors, trustees,
5 and officers of the defendant, The James Irvine Foundation.
6 Two of the other activist defendants who were joined in said
7 action pursuant to said application for joinder also aban-
8 doned their fiduciary trustee responsibility to said minor
9 as executors and trustees of the estate of Myford Irvine,
10 deceased, and throughout this litigation said parties
11 asserted an adverse, hostile and conflict of interest posi-
12 tion against their beneficiary, to wit, James Myford Irvine,
13 a minor, who as a beneficiary under the Will of his deceased
14 father, Myford Irvine, was entitled as a matter of law to
15 look to said trustees to protect his constitutional rights
16 to due process and his substantial interests as a benefi-
17 ciary of said resulting trust. The hostile, adverse and
18 conflict of interest briefs filed by said fiduciary trustees
19 of said minor with the District Court and this court con-
20 stitutes a deliberate breach of the fiduciary obligations
21 said trustees owed to said minor.

22 It therefore appears conclusively from the record
23 in this case which is before this Court of Appeals that said
24 minor heir at law, James Myford Irvine, as an absent indis-
25 pensable party to plaintiff's action was not protected or
26 represented in said action by a single defendant in this

1 case but to the contrary the interests and constitutional
2 rights of said minor heir at law were ruthlessly defeated
3 by the hostile and adverse conduct and fraud of each of
4 said activist defendants towards said minor.

5 The judgment of the District Court and the judgment
6 of this Court of Appeals are void because said judgments
7 violate the due process clause of the Fifth and the Fourteenth
8 Amendments to the United States Constitution for the reason
9 that the District Court and this court were both without
10 jurisdiction over the person of said minor heir at law,
11 James Myford Irvine, to enter their respective judgments
12 herein. Plaintiff invokes both the Fifth and Fourteenth
13 Amendments to the United States Constitution in support of
14 this appeal and in support of this Petition for Rehearing.
15 Hanson v. Denckla, 357 US 235, 2 L.ed 2d 1283, 78 S Ct 1228,
16 citing Pennoyer v. Neff, 95 US 714, 24 L.ed 565.

17 The District Court in plaintiff's action never
18 acquired jurisdiction over the person of the indispensable
19 party minor heir at law and/or beneficiary under the Will of
20 James Irvine, deceased. The judgment of the District Court
21 and the judgment of this court therefore are in violation of
22 the due process clause contained in the Fifth and Fourteenth
23 Amendments to the United States Constitution which renders
24 said judgments void.

25 Plaintiff has set forth in the appendix to this
26 Petition for Rehearing certain applicable excerpts of the

1 law pertaining to indispensable parties in federal court
2 actions which are taken from that eminent authority on
3 Federal Practice, to wit, Moore's Federal Practice 2nd
4 Edition 3A, commencing with Chapter 19 entitled, "Joinder
5 of Persons Needed for Just Adjudication, recompiled in 1967
6 to include the 1966 revision of Rule 19 FRCP."

7 The opinion herein of this court states: "Juris-
8 diction in the district court was thus invoked under 28 U.S.C.
9 Section 1332 and was based upon diversity of citizenship. It
10 is undisputed that the law of California applies."

11 The law of California agrees with the federal cases
12 referred to in this Petition for Rehearing with reference to
13 the mandatory joinder of indispensable and necessary parties.

14 The Supreme Court of California in a landmark decision
15 in California, to wit, Bank of California Nat. Ass'n. v.
16 Superior Court in and for the City and County of San Francisco,
17 16 C 2d 510, 196 P 2d 879, cited by defendant Foundation and
18 defendant Kate L. Wheeler in their Memorandum of Points and
19 Authorities in support of their joinder application, states
20 the law in California that is applicable to appellant's
21 Petition for Rehearing as follows:

22 "First, then, what parties are indispensable?

23 There may be some persons whose interests, rights,
24 or duties will inevitably be affected by any
25 decree which can be rendered in the action.

26 Typical are the situations where a number of

1 persons have undetermined interests in the
2 same property, or in a particular trust fund
3 and one of them seeks, in an action, to recover
4 the whole, to fix his share, or to recover a
5 portion claimed by him. The other persons
6 with similar interests are indispensable par-
7 ties. The reason is that a judgment in favor
8 of one claimant for part of the property or
9 fund would necessarily determine the amount
10 or extent which remains available to the others.
11 Hence, any judgment in the action would in-
12 evitably affect their rights." Emphasis added.

13 Other applicable California authorities are: Hartman
14 Ranch Co. v. Associated Oil Co. 73 P 2d 1163, 1179, 1180,
15 10 C 2d 1082; Guerra v. Packard, 16 Cal.Rptr. 25, 39; Cal-
16 ifornia Water Serv. Co. v. Edward Sidebotham & Son, Inc.,
17 37 Cal.Rptr. 1, 10; Miracle Adhesives Corporation, et al.,
18 v. Peninsula Tile Contractors' Association, et al., 321 P 2d
19 482, 483, 484, 157 CA 2d 591.

20 2. It is inconceivable to the plaintiff that this court
21 will deny plaintiff's Petition for Rehearing for to do so
22 would violate the mandate contained in the decisions of the
23 United States Supreme Court in the recent cases of Provident,
24 et al. v. Patterson, supra, and Hanson v. Denckla, supra, and
25 including the other cases of the United States Supreme Court
26 which are referred to in both of the above Supreme Court

1 decisions and many other federal cases which are likewise
2 referred to in said Supreme Court decisions. As stated by
3 the United States Supreme Court in the case of Hanson v.
4 Denckla, there is not only a question of jurisdiction that
5 is involved in plaintiff's appeal and in her Petition for
6 Rehearing but further there are constitutional rights in-
7 volved based upon the due process clause of the Fifth and the
8 Fourteenth Amendments to the United States Constitution.
9 Plaintiff therefore believes that this Court of Appeals will
10 observe the mandate of the United States Supreme Court and
11 grant the plaintiff's Petition for Rehearing and vacate the
12 judgments of the District Court and this court and reverse
13 and remand the judgment of the District Court with instruc-
14 tions to grant the plaintiff a new trial. However, the
15 plaintiff feels that the opinion of the Court of Appeals in
16 the present case is so devoid of the consideration which the
17 plaintiff's case was entitled to have by this court that
18 said opinion of this court is a gross miscarriage of justice
19 which constitutes a denial to the plaintiff of her consti-
20 tutional rights to due process and to have her day in court
21 in a Court of Appeals as provided in the Fifth and the
22 Fourteenth Amendments to the United States Constitution.

23 No consideration whatever is given by this court in
24 its opinion to any of the substantial issues of fact and
25 law which are raised by the plaintiff in her briefs that
26 were filed with this court. Said issues were supported by

1 many decisions of the Supreme Court and the Appellate Courts
2 of California as indicated by the many California cases that
3 were not only cited by the plaintiff in said briefs but which
4 were also quoted from in said briefs and the appendices
5 thereto. Particularly, the recent case of Lawson v. Lowen-
6 gart, 59 Cal.Rptr. 186, which upholds the contention of the
7 plaintiff that neither the Irvine stock or the Indenture of
8 Trust involved herein were legally delivered by James Irvine
9 to defendant Foundation as trustee. The opinion of this
10 court makes no reference whatever to the California cases
11 that plaintiff brought to the attention of this court with
12 reference to the legal requirements necessary to the legal
13 delivery of a gift inter vivos. The summary opinion of
14 this court is apparently based upon the court's terse state-
15 ment as follows: "In our view, appellant has failed to carry
16 her burden in this respect and after considering her asser-
17 tions and after thoroughly examining the voluminous record
18 in this appeal, we are far from a definite and firm con-
19 viction that a mistake has been committed. To the contrary,
20 we are not in the slightest convinced that the District
21 Court's findings are erroneous -- clearly or otherwise,
22 consequently those findings will not be disturbed." Beyond
23 this general reference to findings, no consideration what-
24 ever is indicated in the opinion of this court concerning
25 the substantial and uncontradicted evidence introduced by
26 the plaintiff and which clearly demonstrated that the

1 specified findings of the District Court as pointed out
2 by the plaintiff in plaintiff's briefs are "clearly
3 erroneous". Furthermore, this court misapplies the Gypsum
4 decision of the United States Supreme Court to the undis-
5 puted facts in plaintiff's case as upholding the foregoing
6 statement of this court. The fact is that the decision
7 of the Supreme Court in the Gypsum case upholds the con-
8 tention of the plaintiff that the findings of the District
9 Court as indicated in the briefs of the plaintiff are
10 "clearly erroneous". This court extracts from the Supreme
11 Court opinion in the Gypsum case the following sentence
12 which is taken clearly out of context, to wit: "It is said
13 that a finding is clearly erroneous when although there is
14 evidence to support it, the reviewing court on the entire
15 evidence is left with a definite and firm conviction that
16 a mistake has been committed." The Supreme Court in the
17 Gypsum case held that the findings of the District Court
18 were "clearly erroneous" which disposition of said case
19 by the Supreme Court is not mentioned in the opinion of
20 this court. The facts in the present case which make the
21 findings of the District Court "clearly erroneous" are the
22 identical evidentiary facts which the Supreme Court ruled
23 made the findings of the District Court in the Gypsum case
24 "clearly erroneous". The portion of said opinion of the
25 Supreme Court in the Gypsum case which is applicable to the
26 facts in the present case is as follows: "In so far as

1 this finding and others to which we shall refer are in-
2 ferences drawn from documents or undisputed facts, heretofore
3 described or set out, Rule 52 (a) of the Rules of Civil
4 Procedure is applicable. That rule prescribes that findings
5 of fact in actions tried without a jury 'shall not be set
6 aside' unless clearly erroneous and due regard shall be
7 given to the opportunity of the trial court to judge the
8 credibility of the witnesses. It was intended, in all
9 actions tried upon the facts without a jury, to make appli-
10 cable the then prevailing equity practice. Since judicial
11 review of findings of trial courts does not have the
12 statutory or consitutional limitations on judicial review
13 of findings by administrative agencies or by a jury, this
14 court may reverse findings of fact by a trial court where
15 'clearly erroneous'". The practice in equity prior to the
16 present Rules of Civil Procedure was that the findings of the
17 trial court, when dependent upon oral testimony where the
18 candor and credibility of the witnesses would best be judged
19 had great weight with the Appellate Court. The findings
20 were never conclusive however. A finding is "clearly
21 erroneous" when although there is evidence to support it,
22 the reviewing court on the entire evidence is left with the
23 definite and firm conviction that a mistake has been
24 committed.

25 "The government relied very largely on documentary
26 exhibits and called as witnesses many of the authors of the

1 documents. Both on direct and cross examination, counsel
2 were permitted to phrase their questions in extremely leading
3 form so that the import of the witnesses testimony was con-
4 flicting. On cross examination, most of the witnesses denied
5 that they had acted in concert in securing patent licenses or
6 that they had agreed to do the things which in fact were done.
7 Where such testimony is in conflict with contemporaneous
8 documents, we can give it little weight, particularly when
9 the crucial issues involved mixed questions of law and fact.
10 Despite the opportunity of the trial court to appraise the
11 credibility of the witnesses, we cannot, under the circum-
12 stances of this case, rule otherwise than that Finding 118
13 is clearly erroneous." Emphasis added. Furthermore, the
14 Supreme Court in the Gypsum case reversed the judgment of
15 the District Court in favor of Gypsum and against the gov-
16 ernment. Exactly the same set of facts existed in the
17 present case as the Supreme Court referred to in the Gypsum
18 case. On the critical issue of legal delivery of the Irvine
19 stock and the Indenture of Trust, the only evidence in the
20 case introduced by the defendant Foundation was the oral
21 testimony of defendants, N. Loyall McLaren and Robert H.
22 Gerdes. McLaren testified that either James Irvine or Myford
23 Irvine told him over the telephone or when he was in Mr.
24 Irvine's office that the Irvine stock had been delivered to
25 Myford Irvine and E. M. Price. Tr. p. 316. Gerdes likewise
26 testified that in a conversation which he stated he held

1 with Mr. Irvine that he was told by Mr. Irvine that the Irvine
2 stock had been delivered to Myford Irvine and E. M. Price.
3 Tr. p. 1816. There is no evidence of any kind in the record
4 that the Indenture of Trust was ever delivered to anybody.
5 The plaintiff introduced in evidence contemporaneous docu-
6 ments which conclusively established as a matter of law that
7 there was no legal delivery of either the Irvine stock or
8 the Indenture of Trust to the defendant Foundation during
9 the lifetime of James Irvine. These contemporaneous docu-
10 ments are all minutely described in the briefs of the plain-
11 tiff filed herein together with their exhibit numbers, and
12 this documentary evidence conclusively established that the
13 conflict between the testimony of N. Loyall McLaren and
14 Robert H. Gerdes and the contemporaneous documents introduced
15 by the plaintiff invoked in plaintiff's case the ruling by
16 the Supreme Court in the Gypsum case that under similar
17 circumstances which existed in the Gypsum case, the law is
18 that the oral testimony of McLaren and Gerdes is entitled
19 to little weight.

20 As jurisdiction of the District Court in this case
21 was based upon diversity of citizenship, it is undisputed
22 that the law of California applies. The plaintiff therefore
23 calls the attention of the Court of Appeals to the rule of
24 law in California which is applicable to the contention of
25 the plaintiff that the findings of the District Court are
26 not supported by the substantial evidence and that said

1 findings are therefore "clearly erroneous" is stated in the
2 Supreme Court of California in the case of Herbert v.
3 Lankershim, 71 P 2d 220, 9 C 2d 409 as follows:

4 "We have stated the evidence as strongly
5 in plaintiff's favor as the record will warrant,
6 and we have made an extended review of the evi-
7 dence because of the often applied rule that
8 an appellate court will not interfere with the
9 judgment entered by a fact-finding body when
10 there exists a substantial conflict in evidence.
11 This rule, however, does not relieve an appellate
12 court of its duty of analyzing the evidence in
13 the light of reason and human experience and
14 giving consideration to the motives and pro-
15 pendencies which tend to influence or prompt
16 human action, in an effort to solve the question
17 as to whether the judgment is reasonably and
18 substantially sustained by the evidence." * * *

19 "There must be more than a conflict of mere
20 words to constitute a conflict of evidence. The
21 contrary evidence must be of a substantial char-
22 acter such as reasonably supports the judgment as
23 applied to the peculiar facts of the case. The
24 rule announced in Morton v. Mooney, et al., 97
25 Mont. 1, 33 P.(2d) 262, 266, correctly states
26 the rule which has been approved by this court

1 in a number of our decisions. It is thus
2 stated: 'While the jurors are the sole
3 judges of the facts, the question as to whether
4 or not there is substantial evidence in support
5 of the plaintiff's case is always a question
6 of law for the court.'" * * *

7 * * * "The rule in cases such as the one
8 before us is that the court must view the
9 transaction with the 'most scrutinizing jealousy'.
10 This means, of course, any court in which the
11 issue may be raised. Oral evidence, of which
12 there is no satisfactory independent corrobora-
13 tion, is the weakest kind of evidence known to
14 the law."

15 The opinion of this Court of Appeals gives no
16 consideration whatever to the substantial issues of fact and
17 law which are involved in this appeal. According to the
18 opinion of the District Court, which opinion is referred to
19 in the opinion of this court, the 459 shares of Irvine stock
20 which is the subject matter of plaintiff's action, is esti-
21 mated at a minimum value of approximately 250 million dollars
22 and a maximum value of approximately 750 million dollars.
23 Under the circumstances, as well as the important issues of
24 fact and law involved in plaintiff's appeal, it would appear
25 that this Court of Appeals did not follow the California law
26 as hereinabove stated by the Supreme Court of California.

1 Under California law, the defendant Foundation as
2 the party holding the affirmative and asserting the validity
3 of the gratuitous inter vivos gift in trust had the burden
4 of proving the delivery, in the legal sense of the Irvine
5 stock and the Indenture of Trust to the trustee. Blonde v.
6 Jenkins, 131 C A 2d 682, 281 P 2d 214; Lawson v. Lowenqart,
7 59 Cal.Rptr. 186, Bogert-Trusts, 2d Ed. Sec. 49, p. 391.
8 The above cases and several others are cited by the plaintiff
9 in her Opening Brief at page 23.

10 The basic issue and the undisputed facts in plain-
11 tiff's case are that neither the Irvine stock or the Indenture
12 of Trust were legally delivered during the lifetime of James
13 Irvine. The only evidence concerning said alleged delivery
14 was the oral testimony of McLaren and Gerdes, both of whom
15 testified that the alleged delivery of the Irvine stock was
16 to Myford Irvine and E. M. Price. It is undisputed that both
17 Myford Irvine and E. M. Price since 1917, the date of their
18 original employment to the date of the death of James Irvine,
19 in 1947, were the exclusive employees of James Irvine. It
20 is, therefore, conclusive that the signatures on the Indenture
21 of Trust of Myford Irvine and E. M. Price merely constituted
22 the signatures of said parties as the employees and servants
23 of James Irvine, who were carrying out the instructions of
24 their employer that they sign said document. Although James
25 Irvine placed his employee Myford Irvine as President and
26 his employee E. M. Price as Secretary of the defendant

1 Foundation, does not change the law of master and servant
2 which compelled a finding by the District Court that both
3 Myford Irvine as President and E. M. Price as Secretary of
4 said corporation served in said officer capacities as the
5 employees and servants of James Irvine, and that he had the
6 full control and dominion over each of them and their every
7 act and deed regardless of their titles because he remained
8 continuously, from February 24, 1937 to August 24, 1947,
9 as their employer and master. Therefore, the alleged deli-
10 very of the Irvine stock and/or the Irvine indenture to
11 said employees does not place either said stock or Indenture
12 of Trust beyond the control of James Irvine during his entire
13 lifetime. Without a legal delivery of the Irvine stock,
14 there was never a legal execution of said Indenture of Trust.

15 The opinion of the California District Court of
16 Appeals in the case of Lawson v. Lowengart, supra, which is
17 referred to in plaintiff's Opening Brief at pages 23, 25 and
18 97 and in the appendix to said brief at pages 38, 39 and 49
19 states as follows: "The actual or symbolic delivery of the
20 securities was essential to complete the inter vivos trust.
21 A delivery by instrument must have the intended effect of
22 divesting the donor of all present control and vesting the
23 trustees with an equitable present right to reduce the fund
24 into possession." This statement of the law in California
25 is based upon two decisions of the Supreme Court of Calif-
26 ornia, which were cited in the Lawson case, to wit,

1 Edwards v. Guaranty Trust, etc. Bank, 7 CA 86, 190 P 57, and
2 Lefrooth v. Prentice, 259 P 947, 202 C 215. Under both of
3 these cases, there could be no legal delivery of either the
4 Irvine stock or the Indenture of Trust to Myford Irvine and
5 E. M. Price as the illusory President and Secretary of the
6 defendant Foundation so long as the relationship of master
7 and servant existed between said parties and James Irvine,
8 and this relationship existed during the entire lifetime of
9 James Irvine both before and after the alleged execution of
10 the Indenture of Trust on February 24, 1937. It therefore
11 follows that there was no legal delivery of either said
12 Irvine stock or said Indenture of Trust as a matter of law.

13 The applicable law to the uncontradicted evidence
14 in plaintiff's case as laid down by the Supreme Court of
15 California in the Edwards case above mentioned is as follows:
16 "To constitute a valid gift inter vivos, the purpose of the
17 donor to make the gift must be clearly established, and the
18 gift must be complete by actual, constructive or symbolic
19 delivery without power of revocation. 20 CYC 1193. In
20 order to accomplish this, 'there must be a parting by the
21 donor with all present and future legal power and dominion
22 over the property.' 20 CYC 1196; Tracy v. Alvord, 118 C 654,
23 59 P 757; Polland v. Placier County Bank, 138 C 169, 66 P 740,
24 71 P 83, 94 Am. St. Rep. 19; Simmons v. Savings Society,
25 31 Ohio 457, 27 Am. Rep. 521. That the law of this state
26 is as stated in the Provident case, supra, will be seen by

1 a perusal of that and the other cases cited therein, citing
2 and quoting from the California cases at length." (The
3 Provident case referred to is entitled, Provident, etc. v.
4 Sisters, etc. 87 N.J. Eq. 424, 100 Atl. 894). Emphasis added.

5 The case of Lefoorth v. Prentice, supra, was
6 decided by the Supreme Court of California subsequent to the
7 Edwards case and in referring to its prior decision in the
8 Edwards case, the Supreme Court of California stated as
9 follows: "A rehearing in this case (Edwards) was denied by
10 the Supreme Court. A careful examination of many cases
11 reveals no exception to the rule announced in the above
12 authorities." (Cases referred to in the Edwards decision
13 hereinabove set forth).

14 Again, it is therefore clearly established that
15 under the law in California that the alleged delivery of
16 the Irvine stock or the Indenture of Trust did not constitute
17 a valid delivery under the circumstances and the uncontra-
18 dicted substantial evidence in plaintiff's case as a matter
19 of law; so long as the relationship of master and servant
20 existed between James Irvine and Myford Irvine and E. M.
21 Price, James Irvine could have recalled or demanded the return
22 to him of said Irvine stock and said Indenture of Trust and
23 in the event that such a demand had been made, said employees
24 could not have refused as a matter of law to comply therewith
25 and it matters not as to whether or not such a demand was
26 made. Moore v. Trott, 104 P 578, 136 C 353, (Supreme Court).

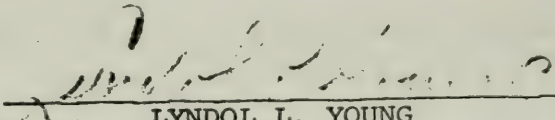
1 The test of an effective delivery in such cases is the
2 absolute relinquishment of recall and the irrevocability of
3 the delivery of the trust property by the donor and so long
4 as the relationship of master and servant existed between
5 said parties, there was no absolute relinquishment thereof
6 by James Irvine. There is, in other words, a pure question
7 of law whether there was such an absolute delivery or not
8 and under the California law the absolute control by James
9 Irvine over his employees and servants Myford Irvine and
10 E. M. Price leaves no question but that there was no legal
11 delivery. Myford Irvine and E. M. Price were in privity
12 with James Irvine. As his employees, they were required to
13 do his bidding. There was no separate identity or legal
14 trustee entity during the lifetime of James Irvine. Their
15 agency to James Irvine or master and servant relationship
16 was so close to James Irvine as their employer as to be
17 held to be privy with him. Until he died, James Irvine
18 possessed absolute power to revoke the alleged delivery of
19 the Irvine stock and recall said stock and dispose of it
20 as he pleased. He retained absolute control and dominion
21 over the trust property. His employees, Myford Irvine and
22 E. M. Price, being at the most mere custodians of the Irvine
23 stock who were subject to his orders.

24 The defendant Foundation endeavors to confuse the
25 issue of legal delivery by asserting that the validity of a
26 trust is not affected by the trustor's reservation of power

1 to revoke. This contention is irrelevant to the issue of
2 legal delivery. The question under the circumstances in the
3 plaintiff's case is whether the gratuitous revocable and
4 unenforceable transfer by the delivery to the employees of
5 the trustor operated to vest title to the 459 shares of
6 Irvine stock in the alleged trustee, during the lifetime of
7 James Irvine, and not whether, if there had been a valid
8 delivery of said Irvine stock to a bona fide trustee which
9 had vested title in said trustee, the trust would be ren-
10 dered invalid because the trust instrument contained a
11 provision that empowered the trustor to thereafter revoke
12 the trust. Before a trust can have any legal existence,
13 there must be an execution of the trust. This involves
14 three basic requirements: 1. Actual signing of the trust
15 instrument by the trustor and a bona fide trustee. 2. For-
16 mal legal delivery to a bona fide trustee of the trust prop-
17 erty or the trust instrument. 3. The actual administration
18 of the trust during the lifetime of the trustor. Petition
19 of Tuckerman, et al., etc., 60 NY Supp. 2d series 284. All
20 three of said requirements are absent. The law in California
21 as established in the Edwards case is that delivery of the
22 trust property must be without power of revocation, "there
23 must be a parting by the donor with all present and future
24 legal power and dominion over the property". It is therefore
25 inevitable that the relationship of master and servant between
26 James Irvine and Myford Irvine and E. M. Price requires that
judgment be entered for the plaintiff as a matter of law.

1 Undersigned counsel certifies that this Petition for
2 Rehearing is not interposed for delay and that in his judgment
3 it is well founded.

4 DATED: November 18, 1968.

5
6 
7 LYNDOL L. YOUNG

8 Attorney for Appellant

9 Athalie Irvine Smith

10 612 South Flower Street, Suite 650
11 Los Angeles, California 90017
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AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
(ss.
COUNTY OF LOS ANGELES)

DOROTHY M. ROUSH, being first duly sworn, deposes
and says:

I am a citizen of the United States, over 18 years
of age, and not a party to the within cause; my business
address is 612 South Flower Street, Los Angeles, California
90017; I served a copy of the attached PETITION FOR RE-
HEARING on the following, by placing same in envelopes
addressed as follows:

Gibson, Dunn & Crutcher,
634 South Spring Street,
Los Angeles, California 90014

Pillsbury, Madison & Sutro,
225 Bush Street,
Los Angeles, California.

Hall, Henry, Oliver & McReavy,
351 California Street,
San Francisco, California

Lillick, McHose, Wheat,
Adams & Charles,
600 South Spring Street,
Los Angeles, California 90014

Latham & Watkins,
615 South Flower Street,
Los Angeles, California

Attorney General of the
State of California,
600 State Building,
Los Angeles, California
Attn: Carl Boronkay,
Deputy Attorney General

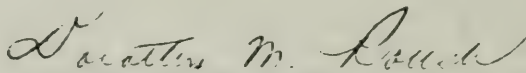
McCutchen, Black, Verleger &
Shea
615 South Flower Street
Los Angeles, California 90017

Elden C. Friel, Esq.
235 Montgomery Street,
San Francisco, California.

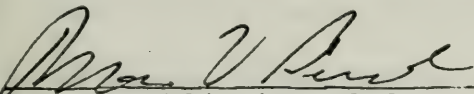
Said envelopes were then, on November 18, 1968,
sealed and deposited in the United States mail at Los Angeles,

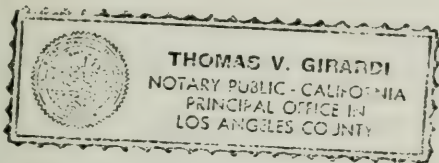
1 California, the county in which I am employed, with the
2 postage thereon fully prepaid.

3 Executed on November 18, 1968, at Los Angeles,
4 California.

5
6 
7 DOROTHY M. ROUSH

8 Subscribed and sworn to before me
9 this 18th day of November, 1968.

10 
11 Notary Public in and for said
12 County and State.



A P P E N D I X

1. Portions of the Opinion of the Court of Appeals for the Third Circuit in the case of: Provident Tradesmens Bank and Trust Company, etc., et al. v. Lumbermens Mutual Casualty Company, etc., et al. 365 F.2d 802.
2. Excerpts from Moore's Federal Practice, 2nd Edition 3A, commencing with chapter 19 entitled, "Joinder of Persons Needed for Just Adjudication" (recompiled in 1967 to include the 1966 revision of Rule 19 F.R.C.P.).

ruling of the Tax Court is affirmed. As to the tax liability of Dr. Parker and F.D.M. the decision of the Tax Court is reversed only as to the issue of the legal fees and expenses paid by F.D.M. and taxed against Dr. Parker. The Commissioner filed a cross-petition "for protective purposes only in the event this Court decides that those items of income were not taxable to F.D.M." Since, we have decided that income to F.D.M. was taxable we need not consider the issues raised in the cross-petition. The case is remanded for recalculation of the tax and penalty due in accordance with the views expressed in this opinion.

Affirmed in part, reversed in part, remanded.



**PROVIDENT TRADESMENS BANK
AND TRUST COMPANY**, Administrator of the Estate of John R. Lynch, Also Known as John Roberts Lynch, Deceased, (Plaintiff)

and

John Landis Harris and Sarah B. Smith, Administratrix of the Estate of Thomas W. Smith, Deceased (Party Plaintiffs)

v.

**LUMBERMENS MUTUAL CASUALTY
COMPANY** and George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased,

Lumbermens Mutual Casualty Company
(Defendant), Appellant.

No. 14589.

United States Court of Appeals
Third Circuit.

Argued Oct. 6, 1964.

Reargued June 9, 1966.

Decided Aug. 30, 1966.

Action was brought for declaratory judgment that automobile was being op-

erated by driver within scope of permission granted to him by insured when automobile collided with truck. The United States District Court for the Eastern District of Pennsylvania, Alfred L. Luongo, J., 218 F.Supp. 892, entered judgment adverse to insurer, and insurer appealed. The Court of Appeals, Kalodner, Circuit Judge, held that the action should have been dismissed because of failure to join insured, an indispensable party to the action, and because there were two pending state court actions presenting question as to coverage of automobile liability policy.

Judgment of District Court vacated, and cause remanded with directions to dismiss the action.

Freedman and Ganey, Circuit Judges, dissented.

1. Declaratory Judgment \Rightarrow 295

Insured under automobile liability policy was an "indispensable party" to action for declaratory judgment that insured's automobile was being operated by third person within scope of permission granted to him by insured when it collided with truck and that therefore automobile liability policy covered accident, and action should have been dismissed because of failure to join insured as party to the action. 28 U.S.C.A. § 2201.

See publication Words and Phrases for other judicial constructions and definitions.

2. Federal Civil Procedure \Rightarrow 303

Party is an "indispensable party" when his rights may be affected, and court cannot proceed to final decision of cause until he is made a party.

3. Federal Civil Procedure \Rightarrow 203

Indispensable party doctrine is not procedural but declares substantive law and affords a substantive right, and therefore indispensable party doctrine is beyond reach of and not affected by Federal Rule of Civil Procedure dealing with necessary joinder of parties. Fed. Rules Civ. Proc. rules 12, 19, 23 U.S.C.A.

4. Federal Civil Procedure ⇨203

Equitable principles standing alone cannot be recruited to thwart or avoid impact of indispensable party doctrine, where a decree will have an injurious effect on interest of absent party.

5. Federal Civil Procedure ⇨203

Equitable considerations are an element of criteria to be applied in determining whether absent party is indispensable, but they are not operative where element of injurious effect on interest of such absent party is present.

6. Declaratory Judgment ⇨293

Declaratory judgment proceeding is not "equitable" within meaning of rule that "equitable" considerations are element of criteria to be applied in determining whether a party is indispensable. 28 U.S.C.A. § 2201.

See publication Words and Phrases for other judicial constructions and definitions.

7. Declaratory Judgment ⇨168

Federal District Court should have denied relief by way of declaratory judgment, without consideration of merits, in action for declaratory judgment that insured's automobile, which was being operated by third person at time of collision with truck, was being operated within scope of permission granted by insured to third person and that therefore automobile liability policy covered automobile, where pending actions in state court, in which insured and all persons involved in accident were parties, presented question as to coverage of policy. 28 U.S.C.A. § 2201.

8. Declaratory Judgment ⇨5

Declaratory judgment is remedy committed to judicial discretion. 28 U.S.C.A. § 2201.

1. The action is premised on Section 2201 of the Declaratory Judgment Act, 28 U.S.C.A. which provides in relevant part as follows:

"In a case of actual controversy within its jurisdiction, * * * any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declara-

9. Declaratory Judgment ⇨392

Court of Appeals is not required to first have view of federal District Court before Court of Appeals may decide that judicial discretion ought not to be exercised in regard to grant of declaratory judgment. 28 U.S.C.A. § 2201.

Norman Paul Harvey, Philadelphia, Pa., for appellant.

Avran G. Adler, Philadelphia, Pa. (Abraham E. Freedman, Freedman, Landy & Lorry, J. Willison Smith, Jr., Bayard M. Graf, Philadelphia, Pa., on the brief), for appellees.

Before KALODNER, GANEY and FREEDMAN, Circuit Judges.

Reargued before STALEY, Chief Judge, and McLAUGHLIN, KALODNER, HASTIE, GANEY, SMITH and FREEDMAN, Circuit Judges.

KALODNER, Circuit Judge.

The instant declaratory judgment proceeding¹ was brought by Lynch's Estate² to determine whether the coverage of a public liability policy issued by the defendant, Lumbermens Mutual Casualty Company, to an owner of an automobile, one Edward S. Dutcher, extended to the deceased Donald Cionci, who was driving the car at the time it was involved in an accident. The policy by its terms extended its coverage to any person operating Dutcher's automobile with his permission at the time of the accident. The critical fact issue to be determined in the declaratory judgment action was whether the automobile was being operated by Cionci within the scope of the permission granted to him by Dutcher when it collided with a truck driven by one

tion, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." (Emphasis supplied.)

2. For simplicity, the name of the representative of the Lynch Estate, namely, Provident Tradesmens Bank and Trust Company, is omitted.

There is no precedent which affords nourishment to a contention that the indispensable party doctrine is nothing more than a procedural rule within the ambit of Rule 19.

It is true that several text writers have summarily treated the indispensable party doctrine as a procedural rule without considering whether it attains the proportion of substantive law. The existence of the threshold question as to whether the indispensable party doctrine is one of substantive law was, however, recently noted by Howard P. Fink, Research Associate, Yale Law School, in his article on "Indispensable Parties and the Proposed Amendment to Federal Rule 19."⁴

Exhaustive research has failed to yield a case in which the precise issue as to whether the indispensable party doctrine is one of substantive law has been raised or decided. However, Chief Judge Aldrich of the First Circuit in a recent case⁵ noted "*the view that what are indispensable parties is a matter of substance, not of procedure.*" (Emphasis supplied.)

Our view that the indispensable party doctrine is *substantive law*, according a *substantive right* to an absent party to be joined when his interests may be "affected by the decree", is premised on *Russell v. Clark's Executors*, *supra*, and the cases which declared the doctrine to be a "settled rule of equity jurisprudence", and the absence of an affected party as "fatal error", which must be recognized *sua sponte* by a trial court.

In *Mallow v. Hinde*, 12 Wheat. 193, 6 L.Ed. 599 (1827), which distinguished and limited to its facts, *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L.Ed. 289 (1825), the Court in holding absent parties indispensable, said at page 198:

"In this case, the complainants have no rights separable from, and independent of, the rights of persons not

made parties. *The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties.*" (Emphasis supplied)

"We do not put this case upon the ground of *jurisdiction*, but upon a much broader ground. * * * We put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the Court." (Emphasis supplied.)

In 1853, in *Northern Indiana Railroad Company v. Michigan Central Railroad Company*, 15 How. 233, 246, 14 L.Ed. 674, the Court, upon its finding that "It is impossible to grant the relief prayed, without deeply affecting the New Albany Company [which had not been joined]," declared:

"* * * in a case like the present, where a court cannot but see that the interest of the New Albany Company must be vitally affected, if the relief prayed by the complainants be given, the court must refuse to exercise jurisdiction in the case, or become the instrument of injustice." (Emphasis supplied.)

✓ In 1854, this classic definition of an indispensable party was enunciated in the landmark case of *Shields v. Barrow*, 17 How. 130, at page 139, 15 L.Ed. 158:

"Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either *affecting that interest*, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." (Emphasis supplied.)⁶

4. 74 Yale Law Journal 403, 430-431 (1965).

5. *Stevens v. Loomis*, 334 F.2d 775, 778, Note 7 (1 Cir. 1964):

6. In 1868, in applying the *Shields* doctrine, in *Barney v. Baltimore City*, 6 Wall. 280, 18 L.Ed. 825, the Court, after defining indispensable parties as those "*whose interests in the subject-matter of the suit,*

In 1870, it was ruled, in *Hoe v. Wilson*, 9 Wall. 501, 19 L.Ed. 762, that a court must *sua sponte* invoke the indispensable party issue even though it was not raised by a party.

There the Court said, at page 504:

"No relief can be given in the case before us which will not seriously and permanently affect their rights and interests. According to the settled rules of equity jurisprudence, the case cannot proceed without their presence before the court. The objection was not taken by the defendant, *but the court should, sua sponte, have caused the bill to be properly amended, or have dismissed it, if the amendment were not made.*" (Emphasis supplied.)

In 1874, the indispensable party doctrine was admirably epitomized in *Williams v. Bankhead*, 19 Wall. 563, 22 L.Ed. 184, in this statement (p. 571):

"Where a person will be directly affected by a decree, he is an indispensable party. * * *

In the oft-quoted *State of Washington v. United States*, 87 F.2d 421 (9 Cir. 1936), there was enunciated what has now become landmark criteria in testing whether a party is indispensable, after it has been determined that he is interested.

The four-fold criteria there stated, at pages 427, 428, follows:

"(1) Is the interest of the absent party distinct and severable?

"(2) In the absence of such party, can the court render justice between the parties before it?

"(3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party?

"(4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed," added this stricture:

"If, after the court determines that an absent party is interested in the controversy, it finds that *all* of the four questions outlined above are answered in the affirmative with respect to the absent party's interest, then such absent party is a *necessary party*. However, if *any* one of the four questions is answered in the negative, then *the absent party is indispensable.*" (Emphasis supplied.)

It is important to note, that in its discussion of the indispensable party question, the Court said, at pages 427, 428:

"In cases where there is error in nonjoinder of parties, either necessary or indispensable, the courts have fallen into common error by designating the error as 'jurisdictional'. The defect is not, properly speaking, a jurisdictional one * * *.

"[T]he nonjoinder of an indispensable party is *fatal error*, and the court *cannot* proceed to a decree in the absence of such indispensable party, notwithstanding the fact that the joinder *would oust the court of jurisdiction*. Neither the statute [Act of March 3, 1911, ch. 231 § 50, 36 Stat. 1101] nor the equity rule [Rule 39 of the Equity Rules of 1912, 23 U.S.C.A. following section 723], * * * permit the court to proceed in the absence of an indispensable party." (Emphasis supplied.)

The indispensable party doctrine as declared in *Shields* and *State of Washington* was applied in *Commonwealth Trust Company of Pittsburg v. Smith*, 266 U.S. 152, 45 S.Ct. 26, 69 L.Ed. 219 (1924) and *Niles-Bement-Pond Company v. Iron Moulders' Union Local No. 68*, 254 U.S. 77, 41 S.Ct. 39, 65 L.Ed. 145 (1920).

This court has time and again likewise done so.

In *Samuel Goldwyn, Inc. v. United Artists Corporation*, 113 F.2d 703

"In such cases the court refuses to entertain the suit, when these parties cannot be subjected to the jurisdiction". (Emphasis supplied.) (p. 284.)

(1940), we held that an absent party is indispensable if his interest is "joint" with that of either plaintiff or defendant, and that the doctrine applies to declaratory judgment actions.

In *Baird v. Peoples Bank & Trust Co. of Westfield*, 120 F.2d 1001, 136 A.L.R. 693 (1941), we specifically held, citing *Shields* and *State of Washington*, that an absent party is indispensable, "if the decree will have an *injurious* effect upon his interest." We there affirmed the District Court's dismissal of a complaint in an action brought by life tenants insofar as it related to the corpus of a trust fund, for failure to join remaindermen who were found to be indispensable parties.

In *United States v. Washington Institute of Technology, Inc.*, 138 F.2d 25 (1943), in affirming the District Court's dismissal of an action for nonjoinder of an indispensable party, we ruled that the requirement in Rule 19(a) that those who have a "joint interest" must be joined referred to parties who were "indispensable" prior to the Rule.

In doing so we said at pages 25-26:

"Rule 19(a) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, requires that those having 'a joint interest shall be made parties * * *'. This means those who were indispensable parties prior to the rules. 2 Moore's Federal Practice (1938) § 19.02. As described in the leading case upon the matter, they were persons who had such an interest that any final decree rendered had to affect that interest. *Shields v. Barrow*, 1854, 17 How. 130, 15 L.Ed. 158." (Emphasis supplied.)

In *Chidester v. City of Newark*, 162 F.2d 598 (1947), we again declared (p. 600):

"* * * indispensable parties under Rule 19 are those who were indispensable prior to the rules; they have such an interest in the controversy that a final decree cannot be made

without either affecting their interests or leaving the controversy in such a condition that a final determination may be wholly inconsistent with equity and good conscience." (Emphasis supplied.)

And, in *Hook v. Hook & Ackerman*, 187 F.2d 52 (1951), we stated in note 7, page 60:

"Rule 19(a) uses the term 'joint interest', stating that those having such an interest 'must' be joined. This provision applies to parties who were indispensable under the previous practice." (Emphasis supplied.)

The courts of appeals in other circuits have in recent years attested to the continuing unimpaired vitality of the indispensable party doctrine as declared in *Shields* and the Supreme Court cases which preceded and followed it.

In 1964, the First Circuit, in *Stevens v. Loomis*, 334 F.2d 775, declared (p. 777): "where the interests of the absent party are inextricably tied in to the cause" he is a "true indispensable party" and "A court cannot proceed in the absence of an indispensable party." (Emphasis supplied.)

Again, in 1964, the Fifth Circuit, in *Hilton v. Atlantic Refining Company*, 327 F.2d 217, in citing and applying *Shields* and *Mallow v. Hinde*, supra, declared (p. 218):

"An indispensable party is one whose relationship to the matter in controversy in a suit in equity is such that no effective decree can be entered without affecting his rights." (Emphasis supplied.)

In 1961, the Ninth Circuit, in *Stumpf v. Fidelity Gas Co.*, 294 F.2d 886, in holding that absent parties were not there indispensable because, inter alia, the judgment sought in the action "would have no injurious effect upon the interest of any absent party", applied the criteria for testing whether an absent party is indispensable which had been laid

7. In *Stevens* it was held that the absent party was only a "necessary" party be-

cause it was not within the "classic definition of an indispensable party."

¶ 19.01—1. General Analysis; Relationship to Due Process, Other Principles, Rules and Substantive Law; Appraisal.

[1]—General Analysis.

Principles governing compulsory joinder of parties were a part of equity practice prior to any statute or rule on the subject.¹ Then in 1839 a statute was enacted, applicable to both law and equity, which partially dealt with the subject by providing for the omission of defendants who were "neither inhabitants of nor found within the district in which the suit is brought."²

Original Rule 19 was promulgated in 1937 and completely revised in 1966.³ Much of original Rule 19(a) was to be found in Rule 37 of the Equity Rules of 1912; and the principle of original Rule 19(b) was incorporated into the Equity Rules of 1842 as Rule 47 and into the Equity Rules of 1912 as Rule 39.⁴

Although present subdivisions (a) and (b) of Rule 19 are quite different in statement and elaboration, their antecedents were subdivisions (a) and (b) of original Rule 19.⁵ Present subdivision (c) parallels its predecessor subdivision (c);⁶ and present subdivision (d) repeats the exception contained in the first clause of predecessor subdivision (a).⁷

Since the federal courts began functioning in 1789, the joinder of persons needed for a just adjudication has been the subject of hundreds of decisions, and also the subject of statute and rules. Because

¹ ¶ 19.19, *infra*.

² 28 USC § 111 (1940); see ¶ 19.19, *infra*; also ¶ 19.01[3], *supra*.

³ ¶ 19.01, *supra*.

⁴ ¶ 19.19, *infra*.

For original Rule 19, see ¶ 19.01[2], *supra*.

⁵ ¶ 19.05[1], *infra*.

Original subdivisions (a) and (b) dealt, respectively, with necessary joinder, and effect of failure to join. ¶ 19.01[2], *supra*.

Present subdivisions (a) and (b)

deal, respectively, with persons to be joined, and determination by court whenever joinder not feasible.

⁶ Original subdivision (c) was titled: "Same: Names of Omitted Persons and Reasons for Non-joinder to be Plead." ¶ 19.01[2], *supra*.

Present subdivision (c) is titled: "Pleading Reasons for Nonjoinder."

See ¶¶ 19.01-1[6], 19.20, *infra*.

⁷ That the rule is subject to the provisions of Rule 23 dealing with class suits. ¶ 19.01[2], *supra*; ¶ 19.21, *infra*.

of this long tradition, the peculiar problems of federal judicial administration,⁸ and other related reasons, the classification of parties is a federal matter, although intertwined with substantive law principles.⁹ Revised Rule 19 does not break with its background tradition. It continues to deal with necessary and indispensable parties; and the latter concept of indispensability remains with us, for basically it is a part of due process and fair administration.¹⁰ If these principles are borne in mind, revised Rule 19 is potentially a good rule in calling the courts' attention to factors and criteria, developed by the cases, that are important in classifying parties as either necessary or indispensable.¹¹

[2]—Due Process and Indispensable Parties.

The Court in *Shields v. Barrow*¹ treated as indispensable "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience"; and ruled that an action must be dismissed if an indispensable party is not before the court.

The good sense underlying this case is based upon the following principles.

In *Western Union Telegraph Co. v. Commonwealth of Pennsylvania*² the Court held that a judgment of a Pennsylvania state court escheating certain intangible property in the hands of Western Union, where the Pennsylvania adjudication could not protect Western Union from having to pay twice since the Pennsylvania court could not secure jurisdiction over other states which might seek to escheat the same property (as New York had done as to part of the property),

⁸ ¶ 19.04, *infra*.

⁹ ¶¶ 19.01-1[3], [4], 19.07[1], *infra*.

¹⁰ ¶¶ 19.01-1[2], [5], 19.07, 19.09, *infra*.

¹¹ ¶ 19.01-1[7], *infra*.

¹ (1854) 17 How 130, 139, 15 L ed 158 (see also ¶¶ 19.02, 19.05, 19.07, 19.10, 19.19, *infra*).

The quote from *Shields v. Barrow*, set forth in the text, is quoted by Chief Justice Warren in *Lumbermen's Mut. Cas. Co. v. Elbert* (1954) 348 US 48, 52, 75 S Ct 151, 99 L ed 59 (see ¶¶ 0.71[4.—6], 0.77[4], *supra*, for the *Elbert* case), and ¶ 19.07 *et seq.* of the Treatise cited.

² (1961) 368 US 71, 82 S Ct 199, 7 L ed2d 139.

denied Western Union procedural due process. And in *Hanson v. Denckla*³ the Court held that a judgment of a state court that had not secured the requisite jurisdiction, in personam, quasi in rem or in rem, over a nonresident trustee deemed by state law to be an indispensable party, also violated due process.

A court cannot render a valid judgment binding upon a person over whom it has not obtained requisite jurisdiction, in personam, quasi in rem, or in rem, as the case may be, unless that person is in privity with or adequately represented by a party over whom the court has jurisdiction.⁴ To extend the judgment in violation of these principles and make it binding upon the person not before the court would constitute a denial of due process as to him.⁵ Such a judgment is not, as to him, entitled to full faith and credit.⁶ And if he is an indispensable party and not before the court, any party who is before the court and who would be adversely affected by the court's judgment has such a direct and substantial interest in the outcome that he can raise the issue of indispensability and the court's lack of jurisdiction over the indispensable party.⁷ Indeed, the lack of an indispensable party is so basic that it can and should be raised by the trial or appellate court on its own motion.⁸

[3]—Classification of Parties a Federal Matter.

The classification of parties¹ is a federal matter.²

In summary of matter and principles elaborated elsewhere, the

³ (1958) 357 US 235, 78 S Ct 1228, 2 L ed2d 1283 (see ¶ 4.25[4], *supra*; ¶ 19.08, *infra*), noted (1959) 11 Stan L Rev 344, 44 Cornell LQ 409, 72 Harv L Rev 695.

⁴ ¶¶ 0.405[4], 0.406, *supra*; ¶¶ 55.09, 60.41, *infra*.

As to privity, see ¶ 0.411, *supra*; and non-party participating in litigation, see ¶ 0.411[6], *supra*.

⁵ *Hansberry v. Lee* (1940) 311 US 32, 61 S Ct 115, 85 L ed 22, 132 ALR 741 (see ¶ 0.406[2], *supra*); *Hanson v. Denckla*, *supra*, n 3.

⁶ *Western Union Telegraph Co. v. Commonwealth of Pennsylvania*, *su-*

pra, n 2; *Hanson v. Denckla*, *supra*, n 3.

⁷ ¶¶ 19.05[2], 19.19, *infra*; *Hanson v. Denckla*, *supra*, n 3; *Western Union Telegraph Co. v. Commonwealth of Pennsylvania*, *supra*, n 2.

⁸ ¶¶ 19.05[2], 19.19, *infra*; *Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co.* (CA3d, 1966) 365 F2d 802, 10 FR Serv2d 19a.1, Case 11.

¹ ¶ 19.02, *infra*.

See also ¶ 19.03, *infra*, dealing with realignment of parties.

² ¶ 19.07[1], *infra*.

reasons are these. Since the inception of the federal judicial system the classification of parties and the problem of compulsory joinder have been treated as a federal matter.³ This treatment is proper since the classification of parties is intertwined with due process and fair judicial administration,⁴ a number of Federal Rules, and with principles of federal jurisdiction, service of process, and venue.⁵

[4]—Relationship to Substantive Law and to Erie-Tompkins.

Some have characterized the indispensable party doctrine as substantive.¹ With deference, we would characterize it otherwise, although the difference between the “substantive” classification and ours may be largely semantic.

Substantive law, federal or state, as the case may be, will determine the rights and interests of the parties before the court, their interrelationship, and the relationship of those rights and interests to those of persons not before the court. Those substantive rights, interests and relationships evaluated,² the court then must determine in the light of procedural due process, fair judicial administration,³ and the criteria set forth in Rule 19 whether it can proceed with the parties before the court or whether there is an indispensable party that is not before the court. In the latter event, unless he can be and is made a party, the action should be dismissed.⁴

If the non-joined party is dispensable, i.e., a necessary but not

³ ¶ 19.01-1[1], *supra*; ¶ 19.19, *infra*.

⁴ ¶ 19.01-1[2], *supra*.

⁵ ¶¶ 19.04, 19.07[1], *infra*.

¹ *Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co.* (CA3d, 1966) 365 F2d 802, 10 FR Serv2d 19a.1, Case 11.

See also *Stevens v. Loomis* (CA1st, 1964) 334 F2d 775, 778, n 7 (referring to the proposed revision of Rule 19 contained in the Preliminary Draft of 1964; as to that Draft, see ¶ 19.01 [4], *supra*).

² Evaluated, not determined on the

merits. For a court cannot transform an indispensable party into a dispensable party by determining in advance that it would decide the claim on the merits in such a way that it would not affect him. *Hilton v. Atlantic Refining Co.* (CA5th, 1964) 327 F2d 217.

³ ¶ 19.01-1[2], *supra*.

⁴ ¶ 19.01-1[2], *supra*; ¶¶ 19.05[2], 19.19, *infra*; *Shields v. Barrow* (1854) 17 How 130, 15 L ed 153; *Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co.*, *supra*, n 1.

[2]—Raising Issue as to Lack of Indispensable Party.

Failure to join conditionally necessary parties is treated elsewhere.¹ But it is appropriate at this time to take account of the non-joinder of an indispensable party. Where federal jurisdiction is predicated upon the character of the parties, as in diversity and alienage, the failure to join a party has a direct bearing on jurisdiction. If the non-joined party is only a conditionally necessary party and his joinder would destroy diversity, revised Rule 19 authorizes the court to proceed without him.² If the necessary party has been originally joined, but his presence would defeat jurisdiction, the court in the exercise of a sound discretion can under Rule 21 permit him to be dropped.³ In each of these situations the court can proceed to render an equitable judgment without his presence. Not so in the case of the indispensable party. His presence is required in order that the court may make an adjudication equitable to all persons involved.⁴ Hence in diversity and alienage cases, the concept of indispensability

¹ ¶¶ 19.07-1[0], 19.19, *infra*.

See also ¶¶ 19.01-1[6], 19.04, *supra*.

² ¶¶ 19.07, 19.07-1, 19.07-2, *infra*.

Under original Rule 19, even though the court could proceed without the presence of a conditionally necessary party, it could, in the exercise of a sound discretion, dismiss the suit. And in some situations it would be an abuse not to do so. *Stevens v. Loomis* (CA1st, 1964) 334 F2d 775. Although the matter is not free from doubt under revised Rule 19, we believe that the discretionary power should continue. ¶¶ 19.07-1[4], 19.07-2[0], 19.19, *infra*.

³ *Girardi v. Lipsett, Inc.* (CA3d, 1960) 275 F2d 492, 494 n 1, cert den (1960) 364 US 821, 81 S Ct 56, 5 L ed2d 50 ("a federal court may drop nondiverse defendants and retain jurisdiction over the case where those dropped defendants are not indis-

pensable parties"); *Kerr v. Compagnie de Ultramar* (CA2d, 1958) 250 F2d 860, 863, 25 FR Serv 19b.322, Case 2 ("It has long been established that a federal court, on motion of the plaintiff, may drop a non-diverse defendant and retain jurisdiction if that party is not indispensable."); *Weaver v. Marcus* (CCA4th, 1948) 165 F2d 862, 11 FR Serv 21.115, Case 1 (set out in ¶ 19.11, *infra*); *Padbury v. Dairymen's League Coop Ass'n* (MD Pa 1954) 15 FRD 484, 19 FR Serv 19b.322, Case 2 (Action to recover on fire policy where defendant moved to dismiss for lack of jurisdiction; the court held that the jurisdictional defect could be cured by dropping non-diverse defendant.).

See also ¶ 21.03, *infra*.

⁴ ¶¶ 19.07, 19.07-2, *infra*.

Disclaimer of interest by indispensable party permits the action to proceed. ¶ 19.03[1], *supra*.

has a direct bearing on jurisdiction.⁵ If the citizenship of an indispensable party, who is omitted or joined, is the same as that of an adverse party, it can be viewed as ousting the court of jurisdiction.⁶

⁵ *Calcote v. Texas Pac. Coal & Oil Co.* (CCA5th, 1946) 157 F2d 216, 218, 167 ALR 413, 9 FR Serv 19a.1, Case 2, citing *Treatise* ("In diversity cases, the question of indispensable parties is inherent in the issue of federal jurisdiction, the determination of which should never await a decision on the merits if the complaint states a cause of action. Jurisdictional questions come first in the orderly disposition of a case. A precarious jurisdiction that limits the scope of judicial decision on the merits cannot be entertained. The same limitation would restrict review on appeal, even on certiorari, and no one could tell whether the court had jurisdiction until it had determined the merits of the controversy."), cert den (1946) 329 US 782, 67 S Ct 205, 91 L ed 671, commented on in (1947) 56 Yale LJ 1088, 21 Tul L Rev 486. The commentator in the *Yale Law Journal* criticizes the court's position that indispensability should be decided before looking to the merits as at odds with the purpose of Rule 19. It is urged that, since the Rule makes the determination of indispensable parties an exercise of the court's discretion, the court, in close cases, should defer determination of whether an absent party whose presence would oust jurisdiction was indispensable until a determination of the merits made it clear whether a decree could be entered without injuring the interested party who was absent, i.e., a hearing on the merits might disclose that the absent party is only necessary.

See in accord with *Calcote, supra*, *Fitzgerald v. Jandreau* (SD NY 1954) 16 FRD 578, 580, 20 FR Serv 19a.1, Case 4, citing *Treatise* ("The absence of an indispensable party precludes the court from proceeding with a case. [citations] For, in a diversity of citizenship cases [sic], such as this case is, it is impossible to determine whether the necessary diversity exists unless all indispensable parties are before the court and the citizenship of each is a matter of record."); *Bentinek v. Guaranty Trust Co.* (SD NY 1952) 109 F Supp 827, 828.

See also ¶¶ 19.01-1[3], 19.03, 19.04 [2], *supra*.

⁶ *Minnis v. Southern Pac. Co.* (CCA9th, 1938) 98 F2d 913; *Gaw v. Higham* (CA6th, 1959) 267 F2d 355, 2 FR Serv2d 19a.1, Case 5, cert den (1959) 360 US 933, 79 S Ct 1453, 3 L ed 1546; *McCormick v. Tipton* (CA6th, 1958) 259 F2d 913, 1 FR Serv2d 19a.1, Case 8; *Clinton v. International Organization of Masters, Mates & Pilots of Am., Inc.*, (CA9th, 1958) 254 F2d 370, 25 FR Serv 19b.322, Case 4; *Hood v. James* (CA5th, 1958) 256 F2d 895, 1 FR Serv2d 19a.1, Case 9; *Underwood v. Maloney* (CA3d, 1958) 256 F2d 334, 25 FR Serv 17b.32, Case 1; *Baten v. Nona-Fletcher Mineral Co.* (CA5th, 1952) 198 F2d 629, cert den (1952) 344 US 864, 73 S Ct 104, 97 L ed 670; *Young v. Powell* (CA5th, 1950) 179 F2d 147, 13 FR Serv 19a.1, Case 5, cert den (1950) 339 US 948, 70 S Ct 804, 94 L ed 1362; *Donaldson v.*

But the concept of indispensability goes beyond federal jurisdiction and touches the very power or the right of the court to make an equitable adjudication, where an indispensable party is not before it.⁷

Werblow (ND Tex 1956) 140 F Supp 244, 22 FR Serv 19h.321, Case 1; Alden v. Central Power Elec. Coop., Inc. (D ND 1956) 137 F Supp 924, 22 FR Serv 13h.11, Case 1.

See also ¶ 19.03, *supra*.

We would prefer not to put the concept of indispensability on jurisdictional grounds. If the indispensable party is joined and his joinder destroys diversity, then so long as the case is in that posture the court lacks federal jurisdiction. If, however, he is dropped or not made a party, the court has technical federal jurisdiction; but for reasons subsequently stated in the text it cannot properly proceed. And see ¶ 19.07-2[0], *infra*.

¶ 19.01-1[2], *supra*; State of Washington v. United States (CCA 9th, 1936) 87 F2d 421, 427 ("The defect is not, properly speaking, a jurisdictional one. . . ." For analysis of indispensability as made by this case, see ¶ 19.07[1], *infra*); Warner v. First Nat'l Bank (CA8th, 1956) 236 F2d 853, 857, 858, 23 FR Serv 19a.1, Case 6, citing Treatise ("The issue of want of indispensable parties is not a jurisdictional one. . . . Ordinarily dismissal should not be ordered for failure to join an indispensable party, but an opportunity should be afforded to bring in such party."), cert den (1956) 352 US 927, 77 S Ct 226, 1 L ed2d 162; Boris v. Moore (ED Wis 1957) 152 F Supp 602, 608, 609, citing Treatise ("Failure to join an indispensable

party does not oust the jurisdiction of the court in the action before it. But such failure does destroy the power of the court to grant any relief which would in any way affect an absent indispensable party."), aff'd (CA7th, 1958) 253 F2d 523; Pioche Mines Consol. v. Fidelity-Philadelphia Trust Co. (CA9th, 1953) 202 F2d 941, 946, 18 FR Serv 19a.1, Case 13, quoting Treatise ("indispensability is not jurisdictional but is based on equity"), cert den (1953) 346 US 899, 74 S Ct 225, 98 L ed 151; Fitzgerald v. Jandreau (SD NY 1954) 16 FRD 578, 580, 20 FR Serv 19a.1, Case 4, citing Treatise ("The absence of an indispensable party precludes the court from proceeding with a case."); Kohler v. McClellan (ED La 1948) 77 F Supp 308, 315, 11 FR Serv 19a.1, Case 3 (In holding that a shareholder's action must be dismissed because the corporation, an indispensable party, was not before the court, although its citizenship would not defeat jurisdiction, Judge Borah stated: "It is true that the question of indispensable parties is jurisdictional in diversity cases. However, we need not base our decision on lack of jurisdiction but may put it on a much broader ground. As was said in Mallow v. Hinde, 12 Wheat 193, 6 L ed 599: 'We do not put this case upon the ground of jurisdiction but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate

In this situation, barring exceptional equities,⁸ it should not proceed without his joinder, even though his citizenship would not destroy jurisdiction in the cases of diversity and alienage, or although it is immaterial, as when jurisdiction is based on the character of the subject matter—a federal question.⁹

directly upon a person's rights without the party being either actually or constructively before the court.'").

See also ¶ 19.19, *infra*.

⁸ *Benger Laboratories Ltd. v. R. K. Laros Co.* (ED Pa 1960) 24 FRD 450, 452, 2 FR Serv2d 12h.22, Case 1 ("In my opinion, dismissal is not automatic under the Federal Rules upon a showing that an indispensable party has not been joined. This is so in spite of the fact that this defense is based upon a defect considered to be on a par with lack of jurisdiction over subject matter and failure to state a claim or legal defense to the extent that it can be raised by the parties at any time during the proceedings. F.R.Civ.P. rule 12(h) cannot be interpreted to mean that a party with the necessary information to make a motion for joinder of an indispensable party can sit back and raise it at any point in the proceedings, when the only effect of the motion under the circumstances would be to protect himself and not the person alleged to be indispensable. Such an interpretation would violate the direction of F.R. Civ.P. rule 1 that the rules 'shall be construed to secure the just, speedy, and inexpensive determination of every action.'"), *aff'd* (CA3d, 1963) 317 F2d 455, *cert den* (1963) 375 US 833, 84 S Ct 69, 11 L ed2d 64; *Parker Rust-Proof Co. v. Western Union Telegraph Co.* (CCA2d, 1939) 105 F2d 976 (holding that the

court had power to proceed without joinder of an indispensable party because of the latter's inequitable conduct), noted in (1940) 24 Minn L Rev 705, *cert den* (1939) 308 US 597, 60 S Ct 128, 132, 84 L ed 500. Since this was a suit to obtain the issuance of a patent, see ¶ 19.14[3], *infra*, the non-joinder of the "indispensable" party did not affect federal jurisdiction.

Cf. *Klumb v. Roach* (CCA7th, 1945) 151 F2d 374 (This was a similar type of proceeding. *T*, who held a half-interest, by recorded assignment of which plaintiff had notice, in defendant *R*'s application for a patent and opposition proceedings to plaintiff's application for a patent, held to be an indispensable party to plaintiff's action against *R*. And the fact that *T* was *R*'s attorney did not afford sufficient equitable grounds to dispense with his joinder.), *cert den* (1946) 327 US 784, 66 S Ct 684, 90 L ed 1011.

See n 11, *infra*.

Disclaimer of interest by indispensable party. See ¶ 19.03[1], *supra*.

⁹ See, *e.g.*, *United States v. Fried* (ED NY 1960) 183 F Supp 371, 3 FR Serv2d 19a.1, Case 2 (Action by government pursuant to 28 USC § 1345 to collect disability benefits under an insurance policy on the life of delinquent taxpayer. *Held*; beneficiary under the policy was an

¶ 19.07. General Analysis of Who Are Necessary and Indispensable Parties.

[1]—Principles Developed Prior to 1966 Revision.

In spite of the vast number of cases that have arisen concerning who are necessary and who are indispensable parties, the governing principles have remained comparatively simple and constant. Most often cited for these principles is the case of *Shields v. Barrow* in which Justice Curtis said:

"Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it . . . are commonly termed necessary parties; but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other persons, not before the court, the latter are not indispensable parties. . . . Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. . . ."

are indispensable parties.¹ And Justice Curtis further said:

¹ *Shields v. Barrow* (1854) 17 How 130, 139, 15 L ed 158.

See also *Williams v. Bankhead* (1874) 19 Wall 563, 572, 22 L ed 184; *Horn v. Lockhart* (1873) 17 Wall 570, 21 L ed 657; *Lumbermens Mut. Cas. Co. v. Elbert* (1954) 348 US 48, 52, 75 S Ct 151, 99 L ed 59 (quoting last sentence of the quotation set forth in the text; and citing ¶ 19.07 *et seq.* of the Treatise; the *Elbert* case is discussed in ¶¶ 0.71 [4.—6], 0.77[4], *supra*).

The foregoing passage from the first edition of the Treatise is quoted in *County of Platte v. New Amsterdam Cas. Co.* (D Neb 1946) 9 FR Serv 19a.11, Case 1, 6 FRD 475, and in *Firemen's Fund Ins. Co. v. Cran-*

dall Horse Co. (WD NY 1942) 47 F Supp 78, 6 FR Serv 19b.1, Case 2; *Ducker v. Butier* (App DC 1939) 104 F2d 236, citing Treatise; *Winchester Electronics Corp. v. General Prods. Corp.* (D Conn 1961) 198 F Supp 355, 358, 5 FR Serv 19a.1, Case 3, citing Treatise; *MacBryde v. Burnett* (D Md 1941) 41 F Supp 661, 5 FR Serv 19b.1, Case 2, citing Treatise.

And see *Reid v. Reid* (CA10th, 1959) 269 F2d 923, 926, 2 FR Serv2d 19a.1, Case 11; *Order of R.R. Tel. v. New Orleans, T. & M. Ry.* (CA8th, 1956) 229 F2d 59, 67, cert den (1956) 350 US 997, 76 S Ct 548, 100 L ed 861; *Williams v. Pacific Royalty Co.* (CA10th, 1957) 247 F2d 672, 675; *Skelly Oil Co. v. Wickham* (CA10th,

"To use the language of this court, in *Elmendorf v. Taylor*, 10 Wheat., 167: 'If the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach,—as if such party be a resident of another state,—ought not to prevent a decree upon its merits.' But if the case cannot be thus completely decided, the court should make no decree."²

Parties have been held indispensable because their "rights are so entangled with one another that it is practically impossible in the decree to protect those that are absent."³ In another case parties were held indispensable because the decree would be of "immediate concern" to them.⁴ And because the relief sought in a bill could not possibly be effective without the joinder of an absent party, that party was held indispensable.⁵ The fact that the final judgment rendered

1953) 202 F2d 442, 446; *Metropolis Theatre Co. v. Barkhausen* (CA7th, 1948) 170 F2d 481, 485, cert den (1949) 336 US 945, 69 S Ct 812, 93 L ed 1101; *Wyoga Gas & Oil Corp. v. Schrack* (MD Pa 1939) 27 F Supp 35, 1 FR Serv 19b.1, Case 1, aff'd on reargument 29 F Supp 582, 2 FR Serv 19b.312, Case 1; *Rhoads v. National Iron Bank* (ED Pa 1940) 35 F Supp 650; *Kelley v. Queeney* (WD NY 1941) 41 F Supp 1015; *Stuff v. LaBudde Feed & Grain Co.* (ED Wis 1941) 42 F Supp 493, 5 FR Serv 19b.312, Case 1; *Koster v. (American) Lumbermens Mut. Cas. Co.* (ED NY 1945) 8 FR Serv 19a.1, Case 6.

² *Shields v. Barrow* (1854) 17 How 130, 142, 15 L ed 158.

³ *Roos v. Texas Co.* (CCA2d, 1927) 23 F2d 171, cert den (1928) 277 US 587, 48 S Ct 434, 72 L ed 1001.

See also *Ingersoll v. Pearl Assur. Co.* (ND Cal 1957) 153 F Supp 558 (in action to recover for fire loss, insurer's agent was found to be indispensable party defendant because

plaintiff's claims against him were "so interwoven" with the claims against the insurer that complete adjudication of the parties' rights could not be had without his presence).

⁴ *State of Texas v. Interstate Commerce Comm'n* (1921) 258 US 158, 42 S Ct 261, 66 L ed 531. The suit was brought by the state against the Interstate Commerce Commission to have its rulings on wages declared unconstitutional, and employers and employees who were operating under the rulings were held indispensable because the decree would be of "immediate concern" to them.

⁵ *Kendig v. Dean* (1878) 97 US 423, 425, 24 L ed 1061. In a suit by a stockholder against X, who had fraudulently deleted the complainant's name from corporate books while X was in wrongful possession of them, for an order that the name be restored, held the corporation is an indispensable party, because X was powerless to comply with the decree if given. The court said, "The court would find itself in the position of

§ 19.08. Actions Involving a Fund, a Trust, or an Estate.

Where the purpose of the suit is the disposition of a fund, a trust, or an estate to which there are several claimants, all of the claimants are generally indispensable.¹

And this principle is applicable to an action involving a labor union or unions concerning the disposition of a fund, a trust, or an estate.²

¹ Russell v. Clark's Ex'rs (1812) 7 Cranch 69, 3 L ed 271; Williams v. Bankhead (1874) 19 Wall 563, 22 L ed 184.

Franz v. Buder (CCAsH, 1926) 11 F2d 854 (owner of life estate in personality, consisting largely of corporate stock, which had been placed in hands of trustees to manage, and all other remaindermen or their heirs, held indispensable parties to suit by one of remaindermen against one of trustees for an accounting and to establish an interest in stock dividends received by trustee), cert den (1927) 273 US 756, 47 S Ct 459, 71 L ed 876; Ducker v. Butler (App DC 1939) 104 F2d 236 (Statute authorized payment out of appropriation made for lands taken from Indians, of fees and expenses for services rendered by attorneys or agents having approved contracts with such Indians, or assignments thereof. Estate of deceased assignee of interest in approved contract with Indians was "indispensable party" to suit for an apportionment to satisfy claim against fund.).

Metropolitan Life Ins. Co. v. Dumpson (SD NY 1961) 194 F Supp 9, 4 FR Serv2d 19a.1, Case 13, citing Treatise (insured in life insurance policy is indispensable to insurance company's interpleader action to determine claims to cash surrender

value of the policy by insured's allegedly abandoned wife and the Commissioner of Welfare); Gentry v. Hibernia Bank (ND Cal 1957) 152 F Supp 469, 24 FR Serv 19a.1, Case 15 (action against 13 of 15 shareholders of bank to determine proprietary interests in assets of bank; held remaining 2 shareholders are indispensable).

See also § 19.18[1], *infra*.

Exception is properly made where a judgment can be framed so that an absent party will not be prejudiced. § 19.07-2[2], *supra*.

² § 19.13[2], *infra*; Eads v. Sayen (CA7th, 1960) 281 F2d 791, 3 FR Serv2d 19a.1, Case 8; Fitzgerald v. Jandreau (SD NY 1954) 16 FRD 578, 580, 20 FR Serv 19a.1, Case 4, citing Treatise ("One of the issues here is the right to possession and use of the funds and property of local 301. Where the purpose of the suit is the disposition of a fund, to which there are several claimants, all of the claimants are generally indispensable. . . . 3 Moore's Federal Practice, 2nd Ed. [§ 19.08]." Local union is indispensable.); Fitzgerald v. Haynes (MD Pa 1956) 146 F Supp 735, 23 FR Serv 19a.1, Case 11, aff'd (CA3d, 1957) 241 F2d 417, 23 FR Serv 19a.1, Case 13; Fitzgerald v. Santoianni (D Conn 1950)

In a suit to impound a sum of money to which several partners are claimants, all partners are indispensable parties,³ except that if one partner disclaims all interest in the partnership claim that partner is no longer an indispensable party.⁴

A bank which has a contractor's voucher for a specific sum of money is indispensable to a suit by the contractor's surety to restrain him from paying out the money.⁵ But a contractor is not an indispensable party to an action by a materialman to recover funds paid by the contractor to a third party where the funds are required under state law to be held in "trust" for payments of plaintiff's claims.⁶

Conflicting claimants to the rights under an insurance policy are indispensable parties, if the action is to enjoin payment by the insurance company.⁷ In an action by a bankrupt for disability insurance benefits accruing before bankruptcy but not listed as assets, the trustee in bankruptcy is an indispensable party.⁸

Claimants to a fund being administered by a state court must be regarded as indispensable to a suit by the United States for an accounting and delivery of the funds.⁹ Creditors who have levied

95 F Supp 438, 15 FR Serv 19a.1, Case 3.

See also *Hanson v. Hutchison* (CA7th, 1954) 217 F2d 171, 20 FR Serv 19a.1, Case 5.

³ *Raphael v. Trask* (CC SD NY 1902) 118 Fed 678.

For discussion of actions by and against partners, see ¶ 19.11, *infra*.

⁴ *Grant County Deposit Bank v. McCampbell* (CA6th, 1952) 194 F2d 469, 16 FR Serv 19a.1, Case 11, 31 ALR2d 909 (see ¶ 19.03[1], *supra*).

⁵ *Garretson v. National Sur. Co.* (CCA5th, 1933) 63 F2d 847.

⁶ *Gramatan-Sullivan, Inc. v. Koslow* (CA2d, 1957) 240 F2d 523, 525, 23 FR Serv 19a.1, Case 12, per Judge Learned Hand: "It is clear that the contractor has no personal interest in the outcome of this ac-

tion, because if the plaintiff succeeded, the payments made by the defendant would *pro tanto* reduce its debt to the plaintiff and would at most revive the defendant's claim against it, thus merely changing one creditor for another."

⁷ *Mahr v. Norwich Union Fire Ins. Co.* (1891) 127 NY 452, 28 NE 391. This case refers to the parties as necessary. The term "necessary" in state cases corresponds to "indispensable" in federal cases.

Cf. *New England Mut. Life Ins. Co. v. Brandenburg* (SD NY 1948) 8 FRD 151, 11 FR Serv 19b.1, Case 5 (discussed in ¶ 19.10, *infra*).

⁸ *Crook v. Prudential Ins. Co. of Am.* (WD Ky 1940) 34 F Supp 239, 3 FR Serv 17a.11, Case 2.

⁹ *United States v. Bank of New*

Heirs and distributees, however, are not indispensable parties to suits by some of the heirs against an administrator to compel an accounting where the interests involved are severable,²⁴ by a distributee against the administrator and his surety on his bond,²⁵ or against the executor by one claiming to be an heir at law suing to establish an interest in the estate.²⁶ Nor are all heirs and distributees indispensable parties to a suit to construe a will brought against the trustee and representative adverse distributees.²⁷ And where one heir sues a second heir to set aside a deed of trust from decedent to the second heir on grounds of fraud and to declare the property or the proceeds therefrom vested in equal undivided shares among three heirs, the third heir is a necessary but not an indispensable party.²⁸

The distinction in the estate cases, then, is whether the right involved in the suit is separate and divisible or whether it is indivisible: if separate and divisible, adjudication of that right can be had without affecting persons not concerned with that right and such persons are not indispensable; ²⁹ if, however, the right is indivisible then all persons concerned with that right (or parties properly representing them) are indispensable to an action for its adjudication.³⁰

The general rule is that in a suit to alter the terms of a trust in-

know of no exception to the rule that an instrument cannot be destroyed totally by a decree unless all parties to it, or their successors in interest are before the court.'").

²⁴ *Horn v. Lockhart* (1873) 17 Wall 570, 21 L ed 657.

Otherwise if the interests are not severable. See *Baird v. Peoples Bank & Trust Co.* (CCA3d, 1941) 120 F2d 1001, 4 FR Serv 19a.1, Case 6, 136 ALR 693 (see ¶ 19.18[1], *infra*); *Bland v. Fleeman* (WD Ark 1887) 29 F 669.

²⁵ *Payne v. Hook* (1869) 7 Wall 425, 19 L ed 260.

²⁶ *Waterman v. Canal-Louisiana Bank & Trust Co.* (1909) 215 US 33, 30 S Ct 10, 54 L ed 80.

²⁷ *De Korwin v. First Nat'l Bank*

(CCA7th, 1946) 156 F2d 858, 9 FR Serv 19a.1, Case 3 (since certain of the named parties were not indispensable they could be dismissed to preserve federal jurisdiction), cert den (1946) 329 US 795, 67 S Ct 481, 91 L ed 680.

Cf. Hutchison v. Fulton, supra, n 22; *Young v. Powell, supra*, n 23.

²⁸ *Blizzard v. Penley* (D Colo 1960) 186 F Supp 746, 3 FR Serv2d 19a.1, Case 11 (and the court exercised its discretion to proceed where the joinder of the third heir would destroy diversity and an action in the state court may be barred by limitations).

²⁹ See, for example, n 13, *supra*.

³⁰ See, for example, n 23, *supra*.

strument or to declare the trust invalid all parties who would be affected by the adjudication are indispensable.³¹ Relative to invalidity, in reviewing a state court judgment, Chief Justice Warren stated in *Hanson v. Denckla*:

"Florida adheres to the general rule that a trustee is an indispensable party to litigation involving the validity of the trust. In the absence of such a party a Florida court may not proceed to adjudicate the controversy."³²

Where rights in a trust are involved in an action by a beneficiary against the trustee, all beneficiaries whose interest in the estate will be affected must be before the court.³³ But where the beneficiaries' interests in the trust *res* are separate and distinct, they are not indispensable to an action by one beneficiary where relief can be granted without prejudice to the interests of the other beneficiaries.³⁴ And all the beneficiaries of a trust are not indispensable in an action to remove the trustee for misconduct.³⁵

³¹ ¶ 19.10, *infra*.

³² *Hanson v. Denckla* (1958) 357 US 235, 245, 78 S Ct 1228, 2 L ed2d 1283 (see ¶ 4.25[4], 19.01-1[2], *supra*), noted (1959) 11 Stan L Rev 344, 44 Cornell LQ 409, 72 Harv L Rev 695.

³³ *Matthies v. Seymour Mfg. Co.*, *supra*, n 19; *Franz v. Buder*, *supra*, n 1; and see *Wood v. Honeyman* (1946) 178 Ore 484, 169 P2d 131, 171 ALR 587.

For more elaboration, see ¶ 19.18 [1], *infra*.

³⁴ *Clayton v. James B. Clow & Sons* (ND Ill 1957) 154 F Supp 108, 25 FR Serv 56c.41, Case 4, citing *Treatise* (action by beneficiary seeking determination of his right in stock sold by life tenant and trustee plus restoration of the shares to the trust created by will; *held*, other persons interested in the stock need not be joined since the relief sought

can be granted without prejudice to their interests).

Cf. Stevens v. Loomis, *supra*, n 19.

³⁵ *Wesson v. Crain* (CCA8th, 1948) 165 F2d 6, 11 FR Serv 19b.1, Case 1, set out in ¶ 19.13[1], *infra*.

Green v. Green (CA7th, 1954) 218 F2d 130, 20 FR Serv 19a.1, Case 7, cert den (1955) 349 US 917, 75 S Ct 606, 99 L ed 1250 (in action, by some beneficiaries against a trustee, based upon monies allegedly converted by the trustee in which an accounting, removal of the trustee and a money judgment were sought, a co-beneficiary, also the wife of the trustee, need not be joined since the relief asked would not prejudice her interests and she has indicated a position more akin to the trustee than to the beneficiaries); *Booth v. Security Mut. Life Ins. Co.* (D NJ 1957) 155 F Supp 755, 25 FR Serv 23a.2, Case 1 (class action by three members of local union as

Normally, the beneficiaries of a trust need not be joined in an action by the trustee against third persons, or vice versa, for he represents their interests and is a real party in interest plaintiff or defendant, as the case may be.³⁶ However, all beneficiaries who are entitled to a percentage of the net income from a trust must join in an action to recover for the wrongful taking of trust assets, where the trustee's interests are adverse or hostile to the cestuis, or he in bad faith refuses to sue on their behalf.³⁷

A settlor of a trust, who was neither trustee nor beneficiary under the trust, is not an indispensable party to an action to set aside a supplemental trust agreement where the settlor did not stand to be deprived of any beneficial interest, nor receive a greater interest, depending on the outcome of the action.³⁸

beneficiaries of trust fund against the trustee of the international union for breach of trust).

Meyerding v. Villaume (D Minn 1957) 20 FRD 151, 24 FR Serv 19a.1, Case 5 (action by one remainderman for accounting by the trustee and for his removal does not require joinder of other remaindermen).

Meyerding, supra, is questionable in permitting the action to go forward for an accounting without requiring joinder of the other remaindermen. See nn 19, 33, *supra*.

³⁶ *Baker v. Dale* (WD Mo 1954) 123 F Supp 364, 20 FR Serv 19a.1, Case 3 (unless there is a conflict of interest the trustees of a trust are

the proper parties plaintiff and thus they must be joined in an action to recover for wrongful taking of trust assets); *Olson v. Miller* (CA DC 1959) 263 F2d 738, 1 FR Serv2d 19a.1, Case 12 (international union need not be joined in action by special trustee of local and secretary of the international for return of property, as its interests are adequately represented).

See also ¶¶ 17.07, 17.12, *supra*; ¶ 19.10, *infra*.

³⁷ See *Baker v. Dale, supra*, n 36 (applying Missouri law).

³⁸ *Sax v. Sax* (CA5th, 1961) 294 F2d 133, 4 FR Serv2d 19a.1, Case 12.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HOWFIELD, INC., formerly GALAXY, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees

JUL 21 1968
No. 22609 ✓

WILLIAM H. AHMANSON, as President
of HOWFIELD, INC., etc.,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees

No. 22602 ✓

APPELLANTS' OPENING BRIEF

Consolidated Appeals from the United States District
Court for the Central District of California

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JUL 26 1968

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STATUTES AND REGULATIONS INVOLVED

STATUTES

SECTION 7602 OF THE INTERNAL REVENUE CODE OF 1954, AS AMENDED (26 U.S. CODE 7602)

Sec. 7602. Examination Of Books And Witnesses.

“For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized —

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.”

SECTION 7604 OF THE INTERNAL REVENUE CODE OF 1954, AS AMENDED (26 U.S. CODE 7604)

Sec. 7604. Enforcement Of Summons.

“(a) Jurisdiction of District Court. — If any person is summoned under the internal revenue laws to appear,

to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement. — Whenever any person summoned under section 6420 (e) (2), 6421 (f) (2), 6424 (d) (2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience."

SECTION 7608 OF THE INTERNAL REVENUE CODE OF 1954, AS AMENDED (26 U.S. CODE 7608)

Sec. 7608. Authority Of Internal Revenue Enforcement Officers.

. . .

(b) Enforcement of Laws Relating to Internal Revenue Other Than Subtitle E. —

(1) Any criminal investigator of the Intelligence Division or of the Internal Security Division of the Internal

Revenue Service whom the Secretary or his delegate charges with the duty of enforcing any of the criminal provisions of the internal revenue laws or any other criminal provisions of law relating to internal revenue for the enforcement of which the Secretary or his delegate is responsible is, in the performance of his duties, authorized to perform the functions described in paragraph (2).

(2) The functions authorized under this subsection to be performed by an officer referred to in paragraph (1) are —

(A) to execute and serve search warrants and arrest warrants, and serve subpoenas and summons issued under authority of the United States;

(B) to make arrests without warrant for any offense against the United States relating to the internal revenue laws committed in his presence, or for any felony cognizable under such laws if he has reasonable grounds to believe that the person to be arrested has committed or is committing any such felony; and

(C) to make seizures of property subject to forfeiture under the internal revenue laws.

SECTION 2282 OF TITLE 28, UNITED STATES CODE.

Section 2282. Injunction against enforcement of Federal statute; three-judge court required

“An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.”

SECTION 2284 OF TITLE 28, UNITED STATES CODE.

Section 2284. Three-judge district court; composition; procedure

“In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of the State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable

damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) If any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. As amended June 11, 1960, Pub.L. 86-507, Section 1(19), 74 Stat. 201."

REGULATIONS

Treasury Regulation 1118.6

“1118.6 *Intelligence Division*. The Intelligence Division enforces the criminal statutes applicable to income, estate, gift, employment and excise tax laws (except those relating to alcohol, tobacco, narcotics, and certain firearms), by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determine investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution process. The Division assists other Intelligence offices in special inquiries, drives and compliance programs and in the normal enforcement programs, including those combating organized wagering, racketeering and other illegal activity, by providing investigative resources upon regional or National Office request. It also assists U. S. Attorneys and Regional Counsel in the processing of Intelligence cases, including the preparation for and trial of cases.”

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HOWFIELD, INC., formerly GALAXY, INC., <div style="text-align:right"><i>Appellant,</i></div>	}	No. 22609
<i>vs.</i>		
UNITED STATES OF AMERICA, et al., <div style="text-align:right"><i>Appellees</i></div>		

WILLIAM H. AHMANSON, as President of HOWFIELD, INC., etc., <div style="text-align:right"><i>Appellants</i></div>	}	No. 22602
<i>vs.</i>		
UNITED STATES OF AMERICA, et al., <div style="text-align:right"><i>Appellees</i></div>		

APPELLANTS' OPENING BRIEF

Consolidated Appeals from the United States District
Court for the Central District of California

INTRODUCTION

FIRST ACTION — CASE NO. 22609

These cases involve essentially the same facts arising out of the same Internal Revenue Service investigation. Case No. 22609 (hereinafter referred to as first action), concerns a complaint (67-488-JWC, United States District Court for the Central District of California), filed by Howfield, Inc., formerly Galaxy, Inc., (hereinafter referred to as the taxpayer), which sought the return of seized property and the suppression of evidence under Rule 41(e) of the Federal Rules of Criminal Procedure. (22609 C.T. 2). (Hereinafter all references to the Clerk's

Transcript will be "C.T.", the Reporter's Transcript, "R.T." and each will be preceded by either 22609 or 22602). The basis for the relief sought by the taxpayer was the taxpayer's claim that its books and records were seized and copied by the government in violation of the taxpayer's constitutional rights. The government filed a motion to dismiss the taxpayer's complaint (22609 C.T. 29) which was initially denied but later was granted by the District Court on December 6, 1967. (22609 C.T. 226). The appeal in the first action is from that final judgment of dismissal. (22609 C.T. 232).

SECOND ACTION — CASE NO. 22602

Case No. 22602 (hereinafter referred to as the second action), involves an action commenced by the government, (67-489-JWC, United States District Court for the Central District of California), seeking enforcement of four Internal Revenue Service summons. (22602, C.T. 2). The taxpayer filed an answer thereto, a counterclaim seeking injunctive relief, and an application for the convening of a Three-Judge District Court. (22602 C.T. 57). The government filed an opposition to the application for a Three-Judge District Court. (22602 C.T. 60). The District Court dismissed the counter claim without leave to amend, and denied the application for a Three-Judge District Court on January 18, 1968. (22602 C.T. 83). The District Court determined that there was no just reason for delay in the entry of judgment and expressly directed that judgment be entered forthwith. (22602 R.T. 13, 311).

Thereafter, limited discovery was permitted (22602 R.T. 1-518), and a trial on the merits was held before a one judge District Court. The matter stands submitted pending the filing of post-trial briefs. The appeal

in the second case is from the judgment dismissing the counterclaim without leave to amend, and denying the application for a Three-Judge District Court. After Notice of Appeal was filed (22602 C.T. 85), the government moved to dismiss this appeal as frivolous and dilatory. This motion was denied by this court on April 2, 1968. Upon the joint motion of the parties, these cases were consolidated for purposes of briefing and argument.

STATEMENT OF ISSUES

1. In the first action, did the District Court err in determining that it had no jurisdiction to hear and determine the taxpayer's complaint under Rule 41(e) of the Federal Rules of Criminal Procedure seeking the return of property, and the suppression of evidence since there was no independent prosecution *in esse* at the time such complaint was filed?

2. In the first action, did the government's forcible return of the documents allegedly seized in violation of the taxpayer's constitutional rights after the taxpayer's complaint was filed, deprive the District Court of jurisdiction over taxpayer's complaint which sought both the return of illegally seized property as well as the suppression of illegally obtained evidence?

3. In the second action, did the District Court err in determining that it had no jurisdiction to hear the taxpayer's counterclaim for injunctive relief since there was an adequate remedy at law, and therefore that the taxpayer was not entitled to equitable relief?

4. In the second action, did the District Court err in failing to determine whether a substantial constitutional issue had been raised by the taxpayer's counterclaim for

injunctive relief and application for convening a Three-Judge District Court?

5. In the second action, did the District Court err in refusing to notify the Chief Judge of this Circuit, as required by Section 2284 of Title 28 of the United States Code, of the taxpayer's counterclaim and application for convening a Three-Judge District Court?

6. In the second action, had the taxpayer raised a substantial constitutional question in its answer and counterclaim so that the application for convening Three-Judge District Court should have been granted?

7. In the second action, did the District Court err in failing to make a determination whether the taxpayer's answer and counterclaim raised a substantial constitutional question?

STATEMENT OF THE CASE

These cases arise as a result of a nationwide criminal investigation conducted by the Intelligence Division of the Internal Revenue Service of the financing of political campaigns in the United States. This investigation which was officially known as "Operation Snowball", concerns the proper reporting of the receipt and disbursement of political contributions by public relations firms acting as campaign managers for political candidates and office holders, as well as whether non-deductible political contributions were illegally claimed as business expenses. (22602 R.T. 409, 411).

In the course of this investigation and in direct furtherance thereof, a series of Internal Revenue Service summons were issued to the taxpayer by a Special Agent of the Intelligence Division pursuant to Section 7602 of the Internal Revenue Code of 1954 (26, U.S.

Code). Initially, nine summons were served on the taxpayer as "a third party" in an alleged investigation of nine public relations firms named in said summons. After various portions of the taxpayer's records were produced in compliance with said summons, four new summons naming the taxpayer as the subject of an investigation were served upon the taxpayer. (22602 R.T. 372; C.T. 7-10). In the second action the government seeks judicial enforcement of these four summons. In both actions, the taxpayer alleged that it was actually the subject of a criminal investigation as much as four months prior to the service upon it of the nine summons directed to it as "a third party", and that as a consequence the government's access to its books and records was obtained through the exercise of fraud and deceit. In addition, the taxpayer further alleged that the primary function and purpose of the Special Agent of the Intelligence Division of the Internal Revenue Service who issued these summons was to investigate the taxpayer's suspected criminal violation of the Internal Revenue Code, and to obtain evidence of such suspected violation. Therefore, the four summons issued by the Special Agent were unenforceable since they were issued for the purpose of obtaining evidence for use in a criminal proceeding in direct conflict with the provisions of the Fourth Amendment to the Constitution.

After the taxpayer's complaint in the first action was filed, the government's petition in the second action was filed. Shortly thereafter, the documents supplied by the taxpayer to the government in response to the nine "third party" summons were forcibly returned by two Special Agents of the Intelligence Division to taxpayer's counsel. (22609 C.T. 96-100). Immediately thereafter, the government moved to dismiss the first action on the ground that since the taxpayer's documents had been

returned, this had the effect of changing the taxpayer's action to an action merely seeking the suppression of illegally obtained evidence. Accordingly, the government's argument concluded, since there was no prosecution *in esse*, the first action was not an independent proceeding over which the Court had jurisdiction. (22609 C.T. 29). This argument was rejected by the Court when initially presented. Later, however, apparently *sua sponte*, the Court granted the government's motion that no jurisdiction existed, and ordered that the second action, which had remained dormant during the pendency of the first action, should be reinstated. (22609 C.T. 226, 22602 C.T. 41).

Immediately thereafter, the taxpayer in the second action filed an answer, counterclaim seeking injunctive relief, and an application for a Three-Judge District Court. In both the answer and counterclaim, the taxpayer alleged that Section 7602 of the Internal Revenue Code, which authorizes warrantless searches and seizures in criminal tax cases, was violative of the Fourth Amendment and that Section 7602 was, therefore, unconstitutional. (22602 C.T. 48). The taxpayer sought to have the government permanently enjoined from utilizing such section as a basis for the issuance of summons directed to the taxpayer as well as to other third parties.

The District Court specifically refused to rule on whether a substantial constitutional question had been raised by the taxpayer. The Court made a determination that the taxpayer had not established that it was entitled to equitable relief since an adequate remedy at law existed. In this respect, the Court ruled that the adequate remedy at law consisted of the taxpayer's right to contest the action seeking the enforcement of the summons and if such resistance proved unsuccessful

at the trial, the right to pursue an appeal. (22602 R.T. 305-311). After the Court ruled that no just cause for delay existed for the entry of judgment, judgment dismissing the counterclaim was entered forthwith and this appeal was taken.

Trial in the second action was held before the District Court sitting without a jury in Los Angeles. The taxpayer's opening post-trial brief was filed on July 15, 1968. The government's answering brief is due on August 5, 1968, and the taxpayer's reply brief is due on August 19, 1968, at which time the matter in the District Court will stand submitted. If the taxpayer's contentions are correct that a Three-Judge District Court should have been convened, all of the District Court proceedings in the second action would appear to be nullity.

ARGUMENT

IN THE FIRST ACTION THE DISTRICT COURT HAD JURISDICTION TO HEAR AND DETERMINE THE TAXPAYER'S COMPLAINT THAT ITS RECORDS WERE SEIZED IN AN UNLAWFUL MANNER, AND THAT SAID RECORDS AS WELL AS ALL COPIES THEREOF SHOULD HAVE BEEN ORDERED RETURNED, AND ANY AND ALL EVIDENCE DIRECTLY OR INDIRECTLY OBTAINED THEREFROM SHOULD HAVE BEEN ORDERED SUPPRESSED AS EVIDENCE.

THE DISTRICT COURT HAD JURISDICTION

There is clear precedent in this circuit for the relief sought by the taxpayer in the first action. In *Goodman v. United States*, 369 F.2d 166 (9th Cir. 1966), this Court held that an action seeking the return of property and the suppression of evidence under Rule 41(e) of the Federal Rules of Criminal Procedure, was maintainable

even though the taxpayer had not been indicted at the time the action was brought. In its argument before the District Court, the government urged that since it returned the taxpayer's records after the taxpayer's complaint was filed, the taxpayer's action was thereby changed to one merely seeking the suppression of evidence which under *DiBella v. United States*, 369 U.S. 121, was a summary rather than an independent proceeding. Since there was no prosecution *in esse*, the government contended such an action was, therefore, not maintainable. The government distinguishes *Goodman* on the ground that in *Goodman*, the taxpayer's records had not been returned by the government.

The taxpayer contends that the government's construction of *DiBella* is incorrect since that case involved the question of an independent proceeding only INsofar AS APPEALABILITY was concerned. In *DiBella*, the Supreme Court merely held that an *appeal* from a judgment denying the return of property or suppression of evidence was maintainable, and would be considered an independent proceeding only if it was not tied to a prosecution *in esse*. The Court did not determine as the government incorrectly contends, that actions of the type brought by the taxpayer in the first action were not maintainable unless there was a prosecution *in esse*.

To the contrary, it is well established that an action seeking to enjoin the use of illegally obtained evidence may be brought prior to indictment, and that the District Court has jurisdiction to grant this relief. See *Burdeau v. McDowell*, 256 U.S. 465 (1921); *Perlman v. United States*, 247 U.S. 7 (1918); *Lapides v. United States*, 215 F.2nd 253 (2nd Cir. 1954); *Hoffritz v. United States*, 240 F.2nd 109 (9th Cir. 1956); *United States v. Rosenwasser*, 145 F.2nd 1015 (9th Cir. 1944).

THE FORCIBLE RETURN OF TAXPAYER'S RECORDS DID NOT DIVEST THE COURT OF JURISDICTION.

The government's further attempt to distinguish the instant proceedings from the above authorities on the basis of the self-help action of the two Special Agents, who in unbelievably clumsy fashion apparently attempted to cure any past wrongs by forcing taxpayer's counsel to accept certain documents and to sign a receipt therefor, is tenuous at best. (For a recitation of the action of the Special Agents in this respect see affidavit of Walter S. Weiss appearing at 22609 C.T. 96-100.)

In addition to the obvious observation that the heavy footed governmental investigator has no place in the American system of justice, and that the government should not be permitted through self-help to deprive the taxpayer of the right to contest the allegedly improper methods utilized in a criminal tax investigation, it is apparent that the return of the taxpayer's documents did not remove the information contained therein from the government's files. Certainly the government will not urge that the knowledge gained from the study of these documents was erased from the agents' minds. This philosophy was laid to rest many years ago in *Silverthorne Lumber Corp. v. United States*, 251 U.S. 385 (1920), where Justice Holmes stated:

“The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the government can gain over

the object of its pursuit by doing the forbidden act. *Weeks v. United States*, 232 U.S. 383, 58 L.ed. 652, L.R.A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U.S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all."

In the first action the District Court should have permitted the taxpayer to establish not only the illegal methods employed by the government agents in the conduct of this investigation, but also that the information so obtained was being utilized in furtherance of a criminal investigation. The taxpayer was, and is, entitled to a return of its property in all respects which is illegally in the possession of the government. The District Court clearly had jurisdiction, and it erred in dismissing the taxpayer's complaint in the first action.

**IN THE SECOND ACTION THE TAXPAYER'S
COUNTERCLAIM FOR INJUNCTIVE RELIEF
RAISED A SUBSTANTIAL CONSTITUTIONAL
QUESTION WHICH REQUIRED THE DISTRICT
COURT TO NOTIFY THE CHIEF JUDGE OF THIS
CIRCUIT SO THAT A THREE-JUDGE DISTRICT
COURT COULD HAVE BEEN CONVENED.**

**THE DISTRICT COURT HAD ONLY LIMITED
AUTHORITY**

Section 2284 of Title 28 of the U.S. Code provides that when an appropriate attack is made upon a statute of

the United States on the grounds of unconstitutionality, the District Court must immediately notify the Chief Judge of the Circuit who is then required to convene a Three-Judge District Court. The Three-Judge District Court determines all of the issues raised by the pleadings, both constitutional and otherwise. *Zemel v. Rusk*, 381 U.S. 1, 6 (1965).

The Supreme Court has repeatedly held that the only determination which the one judge District Court may make is whether the constitutional issue raised was patently insubstantial. *Zemel v. Rusk, supra*; *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962); *Schneider v. Rusk*, 372 U.S. 224 (1963).

If the District Court makes the determination that the constitutional attack is not patently insubstantial, the District Court has no authority other than to notify the Chief Judge of the Circuit and the complainant, as a matter of right, is entitled to have the matter heard by a Three-Judge District Court. The District Court must act in this fashion notwithstanding the fact that the District Court believes the statute being attacked is constitutional. *Zemel v. Rusk*; *Idlewild Bon Voyage Liquor v. Epstein*; *Schneider v. Rusk*.

In *Schneider v. Rusk*, the Supreme Court stated:

“Trial of this case should have been before a Three-Judge District Court convened pursuant to 28 U.S.C. Sections 2282, 2284, as petitioner requested. Her complaint explicitly sought an ‘injunction restraining the enforcement, operation or execution of . . . [an] Act of Congress’—Section 352(a)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. Par. 1484(a)(1), which provides that a naturalized American citizen shall lose his

nationality by 'having a continuous residence for three years in the territory of a foreign state from which he was formally a national or in which the place of his birth is situated . . .'

. . .

"Although no view is here intimated as to the merits of the constitutional question in the present case, we disagree with the conclusion of the courts below as to the substantiality of that issue".

. . .

"The single judge District Court was therefore powerless to dismiss the action on the merits, and should have convened a Three-Judge Court." (Emphasis added.)

In *Idlewild Bon Voyage Liquor Corp. v. Epstein*, at p. 715, the Supreme Court said:

"When an application for a statutory Three-Judge Court is addressed to a District Court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the Three-Judge statute. Those criteria were assuredly met here, and the applicable jurisdictional statute therefore made is impermissible for a single judge to decide the merits of the case, either by granting or by withholding relief."

SECTION 7602 IS PATENTLY UNCONSTITUTIONAL

In support of the contention that Section 7602 is an impermissible attempt to circumvent the Fourth Amend-

ment, the taxpayer relies upon the Internal Revenue Code (Section 7608), the Treasury Department's own regulations (Treas. Reg. 1118.6), the decided cases (*Mathis v. United States*, U.S., 20 L.Ed.2d 381; *United States v. Gower*, 271 F. Sup. 655 (N.D. Pa. 1967); *United States v. Caplan*, 255 F. Sup. 805 (E.D. Mich. 1966); *United States v. Kleckner*, 273 F. Sup. 251 (S.D. Ohio 1967); *United States v. Wainwright*, F. Sup., 21 AFTR 2d 1039 (D.C. Colo. 1968)), and the testimony of both present and former Internal Revenue Service personnel (22609 R.T. 35, Appendix, *infra*). All of these authorities make it abundantly clear that the *primary* function of a Special Agent of the Intelligence Division is to investigate possible criminal violations of the Internal Revenue Code, and to obtain evidence thereof for use in subsequent criminal proceedings.

It is equally abundantly clear that the summons issued by the Special Agent in this investigation was an attempt to carry out this primary function to obtain evidence for use in the prosecution of the taxpayer. The taxpayer submits that if it can be established that, (1), this statute may be construed to authorize the conduct of criminal tax investigations by the use of summons designed to avoid the requirements of obtaining the approval of a neutral and detached judicial officer prior to the compulsory production of a taxpayer's books and records, or (2), the statute has been utilized in such a widespread fashion by an investigative instrumentality of the United States, it is in patent conflict with the Fourth Amendment.*

* (Although it is recognized that evidence produced at the hearing before the District Court commencing on May 7, 1968 is not a part of the official record in these proceedings, in light

THE CRIMINAL INVESTIGATORS OF THE INTERNAL REVENUE SERVICE ARE SUBJECT TO THE SAME RESTRICTIONS AS ALL OTHER FEDERAL CRIMINAL INVESTIGATORS.

In light of the foregoing and the material set forth in the Appendix, it is submitted that the government, occupying the position of being more than merely a litigant before this Court, must now concede that the summons which it is seeking to have ordered enforced were issued for the principal purpose of obtaining evidence of a suspected criminal violation of the Internal Revenue laws by the taxpayer.

In the past it has been the government's consistent position that only if the taxpayer could establish that the *sole* purpose of a Special Agent conducting a tax investigation was the obtaining of evidence for use in a criminal proceeding would it be improper for a summons

of the clear insight revealed into the true nature of this investigation by such proceedings, various portions of the reporter's transcript in those proceedings are set forth in the attached appendix to this brief. These attachments consist of a portion of the testimony of Mr. Thomas Sullivan, a senior trial attorney with the Internal Revenue Service who was formerly Assistant Regional Counsel-Enforcement, and who was the Internal Revenue Service attorney who advised and assisted in the preparation of the four summons which the government seeks to have enforced in the second action; a memorandum dated October 25, 1966 prepared by Special Agent Gabriel Dennis which was addressed to All Audit and Intelligence Personnel Concerned in the Southern California Area; and a portion of a memorandum dated February 13, 1967 prepared by Intelligence Division Group Supervisor Vernon Hansen which was addressed to The District Director of Internal Revenue, Los Angeles, California and which was entitled "Investigation of Political Contributions Deducted as Business Expenses.")

under Section 7602 to be issued. The government's logic then concluded that since the Special Agent is never certain that his investigation will result in a criminal prosecution, and further, since the civil aspects of the case are always pursued at the conclusion of the criminal aspects of the case, these factors demonstrate that the Special Agent's investigation is not conducted *solely* for the purpose of obtaining evidence for use in a criminal proceeding. The taxpayer submits that both the premise and conclusion are erroneous, and the authorities relied upon by the government are no longer valid.

The taxpayer submits that the only appropriate test to be applied is not whether the *sole* purpose for the issuance of the summons was the obtaining of evidence for use in a criminal proceeding, but rather whether this was the *principal* or *primary* purpose. The reason for this is obvious since if the sole purpose test is utilized it could be avoided simply by adding a corollary purpose of relative insignificance. Since the presence of such an insignificant secondary purpose could be completely within the government's control, it is obvious that any test other than the principal purpose test would be meaningless and easily circumvented.

The government's contention that when a summons was issued, the Special Agent was not yet convinced that a crime had been committed and that therefore the issuance of the summons was not for the purpose of obtaining evidence for use in a prosecution *in esse*, is similar to that raised in *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. Seattle*, 387 U.S. 541 (1967). In rejecting these arguments the Supreme Court stated in *Camara*, at p. 530-531:

“It is surely anomalous to say that the individual and his private property are fully protected by the

Fourth Amendment only when the individual is suspected of criminal behaviour. For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security."

In *See*, the rule in *Camara* was extended to include commercial premises. There the Court stated at p. 543:

"Likewise, we see no justification for so relaxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws prescribing minimum physical standards for commercial premises. As we explained in *Camara*, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. *The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant*". (Emphasis supplied).

It should further be noted that there is a clear tendency by the Supreme Court to construe the Fourth Amendment expansively, and in reaching its decisions in both *Camara* and *See*, the Court expressly overruled its prior decision in *Frank v. Maryland*, 359 U.S. 360. Furthermore, the government cannot seriously urge that the Court was required to determine whether the housing inspector in *Camara*, and the fire inspector in *See*, were

solely seeking evidence for use in a criminal proceedings. This is simply not determinative of when or whether a search warrant is required prior to an involuntary search. The Court stated in *Camara* at p. 531: "Like most regulatory laws, fire, health, and housing codes are enforced by criminal processes." This fact, the Court reasoned required that the safeguards of the warrant procedures must be followed. This reasoning is fully applicable in the instant proceedings.

The taxpayer submits that the archaic and deceptive "sole purpose test" so heavily relied upon by the government in the past, has now been thoroughly discredited and is no longer persuasive.

Although the investigating agents in this case have been candid enough to admit that their investigation known as "Operation Snowball" was not a "routine tax investigation", but rather was designed to determine whether criminal violations of the tax laws had occurred (22602 R.T. 313-317, 394-398), in *Mathis v. U.S.*, the Supreme Court placed even "routine tax investigations" within the *Miranda* rule. There the Court stated:

"It is true that a 'routine tax investigation' may be initiated for the purpose of a civil action rather than criminal prosecution. To this extent tax investigations differ from investigations of murder, robbery, and other crimes. But tax investigations frequently lead to criminal prosecutions, just as the one here did. In fact, the last visit of the revenue agent to the jail to question petitioner took place only eight days before the full-fledged criminal investigation concededly began. And as the investigating revenue agent was compelled to admit, there was always the possibility during his investigation that his work would end up in a criminal prosecu-

tion. We reject the contention that tax investigations are immune from the *Miranda* requirements for warnings to be given to a person in custody."

The taxpayer submits that in the instant case, where the facts are far stronger insofar as the primary criminal nature of the investigation is concerned, the demand for access to respondents' books and records without a warrant flies clearly in the face of these pronouncements by the Supreme Court, and the statute which purportedly authorizes such action is patently unconstitutional. Furthermore, the taxpayer is without an adequate remedy at law and is therefore, entitled to the equitable relief prayed for in its counterclaim.

Notwithstanding the cogency of the foregoing material which demonstrates otherwise, the government with questionable candor has consistently urged that Special Agents of the Intelligence Division are something other than criminal investigators.

In *United States v. Gower*, the Court, after first referring to Treasury Reg. 1118.6, characterized the Special Agent of the Intelligence Division as the "Police arm of the Internal Revenue Service" who conducts "inquiries for possible criminal violation". The Court in *Gower* also pointed out that Sections 7601 through Section 7606 of the Internal Revenue Code conferred *civil audit* power on Internal Revenue Agents. This distinction between the civil audit powers and functions of Internal Revenue Agents of the Audit Division, and the criminal investigative power and functions of Special Agents of the Intelligence Division, has been consistently denied by the government. In this case, the summons were not issued by an Internal Revenue Agent of the Audit Division for the purpose of performing a civil audit. They were not issued by a Special Agent of the Intelligence Division for

the purpose of conducting a civil audit. They were issued by a Special Agent for the primary purpose of obtaining evidence for use in a criminal proceeding against the taxpayer.

As indicated above, the recent Supreme Court decision in *Mathis v. United States*, considered the argument advanced by the government that a routine tax investigation conducted by a Revenue Agent was outside the scope of *Miranda*, since “no criminal proceedings might ever be brought”. This substantially identical argument is asserted by the government in these proceedings. (The government also urged in *Mathis* that *Miranda* should not apply since the taxpayer being questioned had not been put in jail by the officers questioning him). In brushing aside these arguments, Justice Black stated that these differences were “too minor and shadowy to justify a departure from . . .” *Miranda*. Respondents submit that the government’s contentions in this case are likewise “too minor and shadowy to justify a departure from” the fundamental Fourth Amendment requirements that investigating police officials may not have the unrestricted right to demand access to, or the production of, books and records without the prior specific approval of an independent judicial officer. The government’s stubborn refusal to admit that the Special Agent was seeking evidence for use in a criminal proceeding based on its minor and shadowy contentions should now be laid to rest once and for all.

The clearly recognized distinction between the civil functions of an Internal Revenue Agent and the criminal functions of a Special Agent are set forth in footnote 2 of the dissent in *Mathis* where it is stated:

“A civil investigator is required, whenever and as soon as he finds ‘definite indications of fraud or

criminal potential,' to refer a case to the *Intelligence Division for investigation by a different agent who works regularly on criminal matters*. In the case before us, such a reference was made 8 days after the second visit to petitioner by (Internal Revenue) Agent Lawless. The *criminal agent* visited petitioner, gave him the full set of 'Miranda warnings,' and was told petitioner did not wish to discuss the case with him. No further questions were asked." (Emphasis supplied.)

**IN THIS APPEAL ALL THE ALLEGATIONS OF THE
COUNTERCLAIM MUST BE ACCEPTED AS TRUE.**

Irrespective of whether the "sole purpose" or "principal purpose" test is utilized, on this appeal this Court is bound to accept all of the allegations of the counterclaim as true. All of the material allegations of a pleading, dismissed without leave to amend, and all reasonable inferences that may be drawn from the pleading must be taken as true. *Clark v. Uebersee Finanz-Korporation A.G.*, 332 U.S. 480, 482 (1947). Such a pleading must be liberally construed and must be sustained except where it is certain that the pleader would not be entitled to relief under any state of facts which could be proved in its support. *Leimer v. State Mutual Life Assur. Co.*, 108 F. 2d 302, 306 (9th Cir. 1940). Justice Frankfurter's warning in *Eccles v. People's Bank of Lakewood Village*, 333 U.S. 426, 432 (1948) is pertinent here:

" . . . Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts . . . "

Accordingly, for the purposes of this appeal this Court must take as facts the following (1) so far as this taxpayer is concerned, "Operation Snowball" constituted a

criminal investigation of this taxpayer and only a criminal investigation of this taxpayer, (2) that those summons that were issued were issued in furtherance of the criminal tax investigation of the taxpayer, and (3) that such further summons as might be issued, the issuance of which the counterclaim sought to enjoin, would be issued in furtherance of the criminal tax investigation of the taxpayer.

A SECTION 7602 SUMMONS IS NOT A VALID SUBSTITUTE FOR A SEARCH WARRANT.

The summons involved in these proceedings are similar not only to the subpoena condemned in *Pollard v. Roberts*, 283 F. Sup. 248 (E.D. Ark. 1968), but also to the subpoena involved in *Mancusi v. De Forte*, U.S., 36 Law Week 4682 (June 18, 1968). In *Mancusi*, a district attorney's subpoena was issued which required the production of certain books and records of a labor union. In holding that the subpoena was not equivalent to a validly issued search warrant, the Court stated at p. 4684:

“Moreover, the subpoena involved here could not in any event qualify as a valid search warrant under the Fourth Amendment, for it was issued by the District Attorney himself, and thus omitted the indispensable condition that ‘the inferences from the facts which lead to the complaint’ . . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.’ *Johnson v. United States*, 333 U.S. 10, 14. *Giordenello v. United States*, 357 U.S. 480, 486.”

In light of the foregoing pronouncements, it is submitted that if it is determined that Congress intended by Section 7602 to confer the unrestricted inquisitorial power which the government seeks to have enforced, said section is patently unconstitutional, since it is in direct contravention of the Fourth Amendment. On the other hand, if the section is being relied upon by the government to permit its criminal investigators to obtain evidence in furtherance of criminal investigations, then the widespread use of this section by the government in this fashion is likewise constitutionally impermissible. In either event, however, since this constitutional issue was properly raised by the taxpayer, a Three-Judge District Court should have been convened to determine the constitutionality of the challenged statute. In addition, the taxpayer should have been granted the equitable relief which it sought.

Respondents further submit that the power which the government contends resides in the Commissioner of Internal Revenue by virtue of Section 7602, is further constitutionally impermissible. By claiming the authority to issue Section 7602 summons to obtain evidence of possible criminal violations of the Internal Revenue Code, the decision of whom to investigate and possibly whom to prosecute has been attempted to be moved to a branch of the executive department, in Washington, D. C., free from the supervision and control of local Courts and local grand juries. When the particularly sensitive nature of this investigation is considered, the reason for the well recognized prohibition against such central authority becomes obvious. Although in the instant proceedings, the taxpayer does not necessarily suggest that the present Commissioner of Internal Revenue is acting in a discriminatory or unfair fashion, the test of impermissible power is not measured by whether

it is being fairly exercised, but rather whether in the absence of adequate safeguards, it may be unfairly applied. The element of fairness is insured by the presence of the supervision by either the Court or the grand jury, historically the only legitimate instrumentalities with processes to compel the production of evidence for use in criminal proceedings.

For the latest reported decision concerning the special significance of investigations of the financing of political campaigns, the Court's attention is respectfully invited to *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark. 1968). Although that case turned on the application of the First Amendment to the Constitution, the case nevertheless points out the dangers resulting from a public agency or officer being permitted to inhibit or discourage unreasonably the meaningful participation of citizens in American political life. As pointed out in *Pollard*, since such an incredible area of abuse is possible, all criminal investigations of political finance must be particularly scrutinized and supervised by the independent judiciary.

A SECTION 7602 SUMMONS ISSUED BY A SPECIAL AGENT IS UNENFORCEABLE.

An area of confusion with respect to the taxpayer's position has perhaps been caused by the peripheral application of *Miranda* and *Escobedo*. In those cases, it has been held that before a suspect is required to be advised of his right to counsel, the accusatory, as distinguished from the investigative stage of an investigation, must have been reached. In *Miranda* this was explained to have occurred when the person had been taken into custody or otherwise deprived of his freedom of action in any significant way. It is the consistent

position of the government that a tax investigation being conducted by a Special Agent of the Intelligence Division does not become a criminal investigation until some restraint upon the taxpayer has been imposed. Thus in the *Kohatsu* situation, for example, *Kohatsu v. United States*, 351 F.2d 898 (9th Cir. 1965), the government successfully urged that the taxpayer there was not entitled to a warning of his constitutional right to counsel since he had been neither arrested nor indicted.

It is not the principal thrust of the taxpayer's argument in this case that the summons here involved are not enforceable because of a failure on the part of the government to comply with the requirements of *Miranda*. Rather, the taxpayer contends that if summons are issued by a Special Agent in the course of his official duties, they are issued for the primary purpose of obtaining evidence for use in a criminal proceeding and are, therefore, unenforceable since the statutory authority for their issuance is unconstitutional. It is completely irrelevant whether or not the taxpayer is in custody, or deprived of his freedom of action in some significant way, when the summons are issued. As indicated in *Camara*, neither custody nor suspicion are required prior to the applicability of the Fourth Amendment.

The taxpayer submits that in the second action it has raised in the pleadings a substantial constitutional question which could only be considered by a Three-Judge District Court. The District Court patently erred in dismissing the taxpayer's counterclaim, denying the taxpayer's application for Three-Judge District Court, and conducting a one judge trial on the merits.

CONCLUSION

In the first action the taxpayer submits that the District Court erred in dismissing taxpayer's complaint seeking the return of illegally seized property and the suppression of illegally obtained evidence.

In the second action the taxpayer submits that it properly raised a substantial constitutional issue and that the District Court erred in dismissing the taxpayer's counterclaim for injunctive relief, in denying the taxpayer's application for a Three-Judge District Court, and in denying the equitable relief sought.

Respectfully submitted,

GOODSON AND HANNAM

and

WALTER S. WEISS

Walter S. Weiss

Wm. E. Hannam

Counsel for Appellants

APPENDIX

Portion of testimony of Thomas J. Sullivan given on May 9, 1968 in U.S. et al v. Ahmanson, No. 67-489-JWC, U.S. District Court, Central District of California, which appears at Reporter's Transcript of the Proceedings, pages 278-279:

"BY MR. WEISS:

Q Do you know whether Mr. Dennis was conducting a civil or a criminal investigation of Galaxy on January 30th when he had this visit with you and showed you the summons?

A He was conducting an examination that could go either way.

Q That I would like you to explain. You mean it could ultimately wind up in a prosecution?

A Right.

Q Or it could wind up in merely civil tax or it might wind up with two taxes?

A That's right, Mr. Weiss.

Q Is that correct?

A That's correct.

Q What was his primary function.

MR. UGAST. If he knows, Your Honor.

MR. WEISS: If he knows.

THE WITNESS: The primary function of a special agent is to investigate possible criminal violations of the Internal Revenue laws."

October 25, 1966

"All Audit and Intelligence Division Personnel Concerned:

October 25, 1966

Acting Chief, Audit Division

Chief, Intelligence Division:

Political Contributions — Operation Snowball.

"An investigation currently being conducted by the Intelligence Division for the years 1962 through 1965 has uncovered evidence that individuals and corporations are taking non-deductible political contributions as business expenses.

"The evidence shows that public relations firms represent various political candidates in obtaining contributions for political campaigns. A scheme has been devised whereby corporations and individuals who wish to make substantial contributions to a political candidate are told that they will be furnished an invoice billing them for 'Advertising Expense,' 'Consultation,' 'Public Relations Services,' et cetera, in the amount of their contribution. They are told that the invoices can then be used as business deductions for income tax purposes.

"The public relations firms then make arrangements with advertising and printing companies whereby these companies submit what appear to be regular invoices for advertising and/or printing to the corporations or individuals making the political contributions.

"The evidence also shows that various political contributors have been receiving billings from various firms of attorneys to cover their political contributions. The contributor receives a billing from an attorney which is indicated as being for 'Advanced Costs' and/or 'Re-

tainer,' The contributor then issues his check in the name of the attorney who deposits these checks to his 'Trust Account.' The attorney then issues a check from the trust account to the designated political campaign. By this method the contributor makes a political contribution and takes a deduction on his books for legal fees.

"It is requested that all Internal Revenue Agents in the Los Angeles District be alerted that in the course of their examinations if they discover payments being made to the following companies and/or attorneys (Payments to attorneys usually are in even amounts of \$500 and/or \$1,000), they immediately notify Special Agent Gabriel Dennis, Ext. 4247, or Vern F. Hansen, Supervisor, Ext. 4256."

Public Relations Firms:

(9 names omitted by direction of Court)

Advertising Firms:

GALAXY ADVERTISING, INC.

(10 names omitted by direction of Court)

Printing Firms:

(7 names omitted by direction of Court)

Attorneys:

(13 names omitted by direction of Court).

(Signed)

Chester B. Parnell,
Acting Chief,
Audit Division
Robert K. Lund,
Chief,
Intelligence Division

(22602 R.T. 340-342) (Reporter's Transcript of Proceedings of May 8, 1968, p. 176-178, U.S. v. Ahmanson, 67-489-JWC, U.S. District Court, Central District of California).

PORTION OF MEMORANDUM DATED FEBRUARY 13, 1967 TO THE DISTRICT DIRECTOR OF INTERNAL REVENUE ATTENTION CHIEF INTELLIGENCE DIVISION LOS ANGELES, CALIFORNIA FROM V. F. HANSEN, GROUP SUPERVISOR, LOS ANGELES, CALIFORNIA WHICH APPEARS AT PAGES 14-15 OF REPORTER'S TRANSCRIPT OF PROCEEDINGS OF MAY 7, 1968 IN U.S. ET. AL. v. AHMANSON, NO. 67-489-JWC, U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA.

“At our request, a meeting was held with representatives of the Office of Regional Counsel. The facts were explained to the representatives of Regional Counsel and they were told that although the original summonses which had been issued in this case had not been honored, we were now in the position that GALAXY, INC. should be investigated for possible criminal violations of the Internal Revenue Code. As a result of that meeting, on January 26, 1967, I made an assignment to Special Agent GABRIEL DENNIS for an unnumbered investigation of GALAXY, INC. and new summonses were drawn up with the approval of Regional Counsel and were served on representatives of GALAXY, INC. on January 31, 1967. The new summonses clearly state that they are being issued in connection with an investigation of GALAXY, INC. (separate summonses were issued for the open and closed years).”

**In the United States Court of Appeals
for the Ninth Circuit**

HOWFIELD, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM H. AHMANSON, RESPONDENTS-APPELLANTS

**On Appeal from the Orders of the United States District
Court for the Central District of California**

BRIEF AND APPENDIX FOR THE APPELLEES

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FILED

AUG 23 1968

WM. B. LUCK, CLERK

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 22609

HOWFIELD, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

No. 22602

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM H. AHMANSON, RESPONDENTS-APPELLANTS

**On Appeal from the Orders of the United States District
Court for the Central District of California**

BRIEF FOR THE APPELLEES

STATEMENT OF THE ISSUES PRESENTED

1. Whether the order of the District Court, dismissing the action of Howfield, Inc., for the suppression of evidence without deciding the merits of the complaint, is a final, appealable order.

2. Whether, if the order is appealable, the District Court committed reversible error in dismissing the complaint.

3. Whether, in proceedings to enforce Internal Revenue summonses calling for corporate records, appellants had an adequate remedy at law by opposing enforcement, with the result that the District Court correctly dismissed their counterclaim seeking injunctive relief and to have Section 7602 of the Internal Revenue Code of 1954 (conferring the summons power) declared unconstitutional by a three-judge district court.

4. Whether, in any event, appellants presented a substantial question concerning the constitutionality of Section 7602.

STATEMENT OF THE CASE

These appeals arise from the dismissal without prejudice of an action brought by Howfield, Inc. for the suppression of evidence (Case No. 22609 in this Court) and from the dismissal for lack of jurisdiction of a counterclaim filed by Howfield, Inc. and its president (William H. Ahmanson) in proceedings against them for the enforcement of four Internal Revenue summonses calling for the production of corporate records.

Both actions were commenced on April 5, 1967. (No. 22609, C. T. 2; No. 22602, C. R. 2.)¹ The ac-

¹ "C. T." will be used to refer to the Clerk's Transcript, i.e., Volume One of the transcript of record in each case. "R. T." will be used to refer to the court reporter's transcript

tion for suppression was dismissed on December 6, 1967. (No. 22609, C. T. 226-227.) The counterclaim was filed in the enforcement proceeding on December 29, 1967. (No. 22602, C. T. 4899), and was dismissed on January 18, 1968. (No. 22602, C. T. 83-84.) Notices of appeal were filed, respectively, on December 14, 1967, in the suppression action (No. 22609, C. T. 232) and on February 1, 1968, in the enforcement proceeding (No. 22602, C. T. 85, 99.)

1. The action to suppress evidence (No. 22609)

On April 5, 1967, Howfield, Inc., a California corporation, filed a complaint in the District Court (No. 22609, C. T. 2-3)² alleging that at various times during November and December, 1966, and January, 1967, the corporate records of Howfield, Inc., "were unlawfully seized, copied and taken from it" by agents of the Internal Revenue Service, and prayed for the return of all documents and copies and for the suppression of all evidence thus obtained "in any criminal proceeding in this judicial district" (No. 22609, C. T. 3). The complaint and its incorporated attachments alleged (No. 22609, C. T. 2-10): that Special Agent Dennis told counsel on November 23, 1966, that access to the records of Howfield, Inc., was desired in connection with an investigation of nine other tax-

in each case. Thus, we conform our usage to that of appellant's brief (Br. 1-2).

² This complaint named as respondents the United States, the United States Attorney (William M. Byrne, Jr.), the Chief, Intelligence Division, Internal Revenue Service (Robert H. Lund), and two special agents of that Service (Gabriel Dennis and Ben Hayes).

payers, and that Howfield, Inc., was a third party to this investigation; that Dennis was told that access would be given only upon service of a summons; that on December 7, 1966, nine Internal Revenue summonses were served requiring the production of Howfield's records "as they pertained to each of the nine named investigatees" (No. 22609, C. T. 5-6); that on December 19, 1967, counsel appeared at the Federal Building in Los Angeles and delivered to Dennis all cancelled checks and invoices between Howfield and the named investigatees for the years specified in the summonses; that Dennis stated that he also wanted to see records concerning indirect transactions but was told that there had been no such transactions; and that on January 31, 1967, Dennis served new summonses on Howfield, Inc.,³ and stated "that in the past plaintiff had been a third party investigatee, but that as of that day it was the subject of a full scale criminal investigation"; that Howfield, Inc., contended that it was "the subject of a criminal investigation" when the agents first visited it on November 3, 1966 and that "through fraud and deception" consent to examine its records had been obtained; and that "a pattern of fraud" had been practiced on "other taxpayers" as well as upon Howfield, Inc. (No. 22609, C. T. 6-7).

On April 13, 1967, the Government filed a motion to dismiss the action for suppression (No. 22609,

³ These summonses were entitled "In the matter of the tax liability of Galaxy, Inc." (No. 22609, C. T. 11-12.) It is undisputed that Howfield, Inc., is the successor to Galaxy, Inc.

C. T. 29-31), asserting lack of jurisdiction on the ground that all the corporate records and copies thereof received from Howfield, Inc. had been returned to it. Attached to this motion were a memorandum of points and authorities (No. 22609, C. T. 32-45) and the affidavits of Special Agent Dennis and other agents (No. 22609, C. T. 46-60).

In his affidavit, Special Agent Dennis stated, *inter alia*, that on November 3, 1966, he directed that Galaxy, Inc. be contacted as a third party witness, in order to examine the records of that corporation concerning a few transactions between it and certain taxpayers who were then under investigation; that Galaxy, Inc., was then treated merely as a third-party witness because the transactions in question were few and were of inconsequential amounts; that he accordingly told Mr. Weiss on November 9 and November 23, 1966, that he was interested in Galaxy, Inc., only as a third-party witness; that at the request of Mr. Weiss he issued nine summonses on December 7, 1966, and on that day Messrs. Weiss and Hannam produced eight original checks and seven original invoices of Galaxy, Inc., but no other books or records; that up to that time he ("my office"—No. 22602, C. T. 56) had no knowledge of the transactions reflected by these documents; that based on those checks and invoices, involving substantial amounts payable to some of the nine public relations forms already under investigation, on January 26, 1967, an assignment was made for a preliminary investigation of Galaxy, Inc., and on January 31, 1967, Dennis informed Mr. Weiss that because of the new information Galaxy, Inc., would

"be the principal of an investigation" (No. 22609, C. T. 56); that when he then asked for the cooperation of Howfield, Inc., for the production of the books and records of Galaxy, Inc., Mr. Weiss requested that summonses be served; that four summonses, accordingly, were then served; that these summonses had not been complied with, and that Special Agent Dennis had never seen any books or records of Galaxy, Inc., except the eight checks and seven invoices; and that he had (No. 22609, C. T. 57) "caused to be returned all documents and all copies of said documents given to me by Mr. Weiss on December 19, 1966."

In an affidavit subsequently filed (No. 22609, C. T. 96-100), Mr. Weiss stated that on April 13, 1967, two special agents of the Internal Revenue Service came to his office, handed him a sealed envelope, and asked him to sign a receipt; that he counted the documents and signed a receipt, a copy (id., p. 100) of which was attached to the affidavit. This receipt acknowledged delivery of "51 sheets of paper which are copies of checks and invoices."

On December 9, 1967, Judge Curtis signed an order (No. 22609, C. T. 228-231) granting the Government's motion to dismiss the action for the suppression of evidence, concluding that the case was controlled by this Court's decision in *Hill v. United States*, 346 F. 2d 175, rather than by this Court's decision in *Goodman v. United States*, 369 F. 2d 166, since the Government had represented that all of the material obtained from Howfield had been returned, and Howfield had made no effort to prove the contrary.

2. The summons enforcement proceedings (No. 22602)

On April 5, 1967, a petition was filed in the District Court on behalf of the United States and Special Agent Dennis against Howfield, Inc., and William H. Ahmanson as its president, pursuant to Sections 7402 (b) and 7604(a) of the Internal Revenue Code of 1954, seeking enforcement of four Internal Revenue Summones which had been issued and served on January 31, 1967, requiring the production of specified corporate books and records of Galaxy, Inc., for fiscal years ending on August 31, of 1962, 1963, 1964, and 1965. (No. 22602, C. T. 2-10, 98.) These summonses (No. 22602, C. T. 7-10) are entitled: "In the matter of the tax liability of GALAXY, INC. [of] Los Angeles, California," and in an affidavit (No. 22602, C. T. 11-13) supporting the petition Special Agent Dennis stated, *inter alia*, that it was necessary to examine the books and records in question in order to ascertain the correct income tax liability of Galaxy, Inc., for the fiscal years specified (*id.*, p. 13).

On December 29, 1967 (after dismissal of the action for the suppression of evidence), Howfield, Inc. and Ahmanson filed an "Answer and Counterclaim for Injunctive Relief" (No. 22602, C. T. 48-56).

The answer asserted four affirmative defenses: (1) that the summonses constituted an unlawful search and seizure and a denial of the effective assistance of counsel and otherwise violated the Constitution of the United States because they were issued (No. 22602, C. T. 49) "for the invalid purpose of obtaining evidence for use in a criminal investigation;" (2) that

Section 7602 of the 1954 Code violates the Fourth, Fifth, and Sixth Amendments to the Constitution; (3) that the agents involved had practiced deceit by misrepresenting the nature, scope, and subject of the investigation, in violation of the foregoing Amendments; (4) that the investigation of Howfield, Inc., and of other firms was "part of a widespread scheme of fraud and deceit," making the summonses here involved violative of the foregoing Amendments.

The counterclaim (No. 22602, C. T. 51-56) alleged that the summonses here involved, as well as those issued to other persons not named, were in furtherance of a criminal investigation being conducted by the Intelligence Division of the Internal Revenue Service; that if Section 7602 of the 1954 Code authorizes such use it is repugnant to the Fourth, Fifth, and Sixth Amendments and also is too vague and indefinite; that Section 7602 should be declared null and void and the United States should be permanently enjoined from attempting to utilize its provisions; that a three judge district court should be convened since a substantial question had been presented concerning the constitutionality of Section 7602, and since Howfield, Inc. and Ahmanson did not have an adequate remedy at law. The counterclaim further alleged (pars. VII through X, No. 22602, C. T. 53-55) that, whether or not Section 7602 is unconstitutional, evidence had been obtained by deceit, and thus by an unlawful search and seizure, with the result that all use and dissemination of such knowledge or information should be enjoined, and the United States and Dennis should be permanently restrained from attempting to

enforce the summonses in question and from utilizing any summonses directed to anyone else, "as part of the criminal tax investigation of Howfield, Inc." (No. 22602, C. T. 55).

On January 18, 1968, an order was entered dismissing the above-described counterclaim and denying the application for the convening of a three-judge district court, on the ground that there was no basis for equitable relief, since Howfield, Inc. and Ahmanson had an adequate remedy at law. (No. 22602, C. T. 83-84, 99.)

SUMMARY OF ARGUMENT

The order of the District Court, dismissing the complaint brought by Howfield for the return of documents and the suppression of evidence, without any decision on the merits, is not a final, appealable order because all the documents obtained from Howfield and all copies thereof made by the government had been returned to Howfield, and nothing remained except a premature request for the suppression of evidence in some future criminal case.

Even if the district court's order were appealable, the District Court did not err in dismissing the complaint as premature.

In addition, Howfield and Ahmanson responded to the Government's petition to enforce Internal Revenue summonses by filing not only answer, but also a counterclaim seeking injunctive orders against the enforcement of the summonses involved in the Government's petition and of any past or future summonses, concerning Howfield's tax liabilities or tax fraud,

against anyone else. The counterclaim also requested that a three-judge court be convened for the purpose of declaring Section 7602 of the 1954 Code unconstitutional, particularly when utilized by a special agent of the Intelligence Division of Internal Revenue Service.

The District Court's dismissal of the counterclaim was correct, since in part it sought the same premature relief requested in the suppression action previously described. As to the remaining parts of the counterclaim, appellant had an adequate remedy at law in opposing the enforcement proceedings, and had no standing to enjoin the use of summonses against unknown third persons in the future. Since appellants did not state a case for an injunction, the District Court properly dismissed the counterclaim without taking steps toward convening a three-judge district court to decide upon the constitutionality of Section 7602. Furthermore, there is no substantial question, in any event, concerning the constitutionality of Section 7602, or the propriety of the utilization of an administrative summons by a special agent of the Intelligence Division of the Internal Revenue Service.

ARGUMENT

I

The District Court Did Not Err In Dismissing the Proceedings for the Suppression of Evidence and Its Order Is Not Appealable**A. Introduction**

Howfield's complaint sought the return of "the property, documents and/or copies thereof" (No. 22609, C. T. 2) which Messrs. Weiss and Hannam had voluntarily turned over to Special Agent Dennis on December 19, 1966 (*id.*, C. T. 55-56), and also sought injunctive relief suppressing the use of evidence derived directly or indirectly from the documents "in any criminal proceeding in this judicial district" (*id.*, C. T. 2).

The Government, in a motion signed by Assistant United States Attorney Magnuson and filed on April 13, 1966 (No. 22609, C. T. 61-74, 240), stated to the District Court (No. 22609, C. T. 68) that "The only corporate records ever turned over to the defendants by plaintiff or its counsel consisted of *copies* of 8 checks and 7 invoices. All copies (including copies thereof) so received have been returned to plaintiffs' counsel." (Emphasis added.) See also, to the same effect, the affidavit of Special Agent Dennis (No. 22609, C. T. 56-57, 85-86), and other statements in memoranda signed by the Assistant United States Attorney (*id.*, C. T. 31, 34, 35, 37, 63, 67).⁴

⁴ For example, the Government stated that "The defendants no longer have possession or custody of any of plaintiff's corporate records or copies thereof (8 checks, 7 invoices),

Howfield's counsel, Mr. Weiss, conceded in his affidavit (No. 22609, C. T. 97) that on April 13, 1967, two special agents delivered to him an envelope and told him to open it, and that he gave a receipt (id., C. T. 100) acknowledging receipt of "51 sheets of paper which are copies of checks and invoices."

In a memorandum opposing the Government's motion to dismiss the suppression proceedings, Attorney Weiss contended that the affidavit of Special Agent Dennis did not make it clear that all copies had been returned to him. (No. 22609, C. T. 110.)⁵ In a reply memorandum signed by Assistant United States Attorney Magnuson, the Government stated in part as follows (No. 22609, C. T. 127):

The record shows, and Government counsel here so states to this Court, that all copies (which of course includes copies of copies) have been returned to the plaintiff.

In an order entered December 7, 1967 (No. 22609, C. T. 228, 231), dismissing the proceedings for suppression of evidence, the District Court concluded that "The rationale of *Hill v. United States, supra* [346 F. 2d 175 (C.A. 9th)] appears to be controlling here." In the same order, the Court had observed (id., C. T. 229):

turned over to them by plaintiff's counsel." (No. 22609, C.T. 31).

⁵ In the same memorandum, it was contended that it was, in any event, immaterial whether all copies had been returned or not, since the information could not be "blotted out" from the memories of the Internal Revenue agents involved. (No. 22609, C. T. 111.)

After the action was filed, the agents returned, what the court assumes to be all, the books and records so seized. It is the position of the Government that this was done, and although the plaintiff admits receipt of books and records, it does not admit having received all of the papers. However, since the plaintiff has made no effort to discover or prove to this court, nor has it in fact contended in its argument, that any paper or document seized has not been returned, the court assumes this has been done.⁶

We submit that the District Court was clearly correct, and certainly did not abuse its discretion, in accepting the explicit representation of the Assistant United States Attorney that *all* copies (including copies of copies) of the checks and invoices obtained from Howfield had been returned to Attorney Weiss, and that the Government no longer had possession of any such material. It follows, from this Court's decision in *Hill v. United States* 346 F. 2d 175, (1) that the District Court did not err in dismissing the proceedings without any ruling on the merits, and (2) that the order of dismissal was not a final, appealable decision.

⁶ In an application to compel answers to interrogatories, filed November 17, 1967, the Government noted that 40 days had elapsed, and noted that "while the plaintiff has stated that he wishes to conduct discovery, he has made no effort to reset the depositions previously scheduled." (No. 22609, C.T. 217-218, 241.) On June 30, 1967, the District Court had denied the Government's motion to quash Howfield's notices of depositions. (No. 22609, C. T. 147.)

B. *The District Court's order is not appealable*

In *Hill v. United States, supra*, the taxpayer (Hill) moved for the return of documents and the suppression of evidence; the documents were returned and the taxpayer apparently acquiesced in the Government's retention of copies; the District Court then denied the further relief of suppression. This Court, on the basis of *DiBella v. United States*, 369 U.S. 121, held that the order was not appealable, observing (p. 178) :

“*DiBella* requires *both* a request for return of property *and* independence from the criminal case before the order denying return becomes appealable.” ⁷

Clearly, this Court's holding in *Hill v. United States, supra*, was correct, since in view of the taxpayer's acquiescence in the Government's retention of copies, nothing remained except his request for the suppression of evidence. Not only were the proceedings not solely (see *DiBella v. United States, supra*, pp. 131-132) for the return of property; they were not any longer proceedings for the return of property to all.

Similarly here, once all copies of the checks and invoices obtained from Howfield (together with copies of the copies made by the Government) were re-

⁷ In *DiBella v. United States, supra*, pp. 131-132, the Supreme Court stated as follows:

Only if the motion is *solely* for return of property *and* is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent. [Emphasis added.]

turned,⁸ the proceeding was not solely for the return of Howfield's property, but was exactly the opposite, *viz.*, a proceeding solely for the suppression of the future use of evidence in a hypothetical future criminal case. Howfield seemingly attempts to escape from the conclusion that the order here involved is not appealable, by complaining that there was a "forcible return" (Br. 9). That description is not borne out by the affidavit of Howfield's counsel (No. 22609, C. T. 97), and it taxes the imagination to conceive of a "forcible" return in speedy compliance with Howfield's complaint seeking that very event. The fact is that everything was returned, and Howfield can hardly complain if compliance with its demands has the collateral result of extinguishing a right to appeal a non-prejudicial ruling dismissing its action.

This Court's subsequent holding in *Goodman v. United States*, 369 F. 2d 166, does not affect the holding of *Hill v. United States*, *supra*, as applied to the present case; rather, it confirms that application. The distinction made in *Goodman* was that, although in that case all original records had been returned, the taxpayers were still seeking the return of the copies made by the Government. Construing such copies as "property", within the meaning of *DiBella*, this Court held that the order of the District Court, denying relief, was appealable. The instant case falls within the holding in *Hill*, because all reproductions of the copies obtained from appellant were returned.

⁸ The originals were never turned over to the Government. (No. 22609, C. T. 68.) Appellants have never denied this assertion.

Furthermore, this Court's holding in *Goodman*, that Goodman would be entitled to the return of copies, made by the Government, of documents illegally obtained from him, now appears incorrect in the light of the Supreme Court's subsequent statement that there is "no possible common law claim * * * for the return of copies made by the Government of the papers it had seized," and that the "remedy of suppression * * * satisfied that demand." *Maryland Penitentiary v. Hayden*, 387 U.S. 294, 305. In *Meister v. United States, et al.*, decided July 8, 1968, the Third Circuit dismissed an appeal in a case similar to this one and said:

Plaintiff asserted in his amended complaint that the defendants [Internal Revenue agents] illegally made copies of his records but he did not specifically request their return. We do not view the absence of such a request decisive because, assuming it had been made, it would not affect our decision.

C. The District Court did not abuse its discretion, even if its order of dismissal were appealable

Even if the order of the District Court, dismissing Howfield's complaint (No. 22609, C. T. 228-231), is to be regarded as an appealable order, it is clear that the dismissal was in complete accord with this Court's views in *Hill v. United States, supra*, and also with the principle that a District Court may, in the exercise of discretion, decide to defer until a more appropriate time any ruling on whether evidence has been acquired in such manner as to render it inadmissible in some future proceeding.

In *Hill v. United States, supra*, this Court not only held that the denial of suppression was not final or appealable, but also addressed its remarks to the status of the case at the District Court level, observing (346 F. 2d, p. 178):

All that remains on this attempted appeal is the district court's order denying appellant's motion to suppress evidence. Since this attempt to suppress evidence has developed before any action has even been commenced, and, for that matter, has developed where an action may never even be commenced, we find this motion is nothing more than a premature request. If a criminal prosecution does subsequently take place, appellant can raise a motion to suppress any evidence which the government may have secured in violation of his constitutional rights.

Clearly, by the foregoing language this Court sanctioned and perhaps even required, the very course adopted by the District Court here.⁹

Furthermore, the District Court's action is sanctioned by the quite general view that a District Court may, as a matter of discretion, dismiss without prejudice a proceeding for the suppression of evidence,

⁹ In *Goodman v. United States, supra*, the District Court did not follow any such course, but, rather, held an evidentiary hearing and rendered a decision on the merits, including findings of fact that no deceit had occurred. Thus, the taxpayer in *Goodman* suffered some degree of prejudice, even if the findings were regarded as entitled merely to great weight or respect on the part of the judge in a future criminal case. Here, the dismissal was not on the merits and necessarily was without prejudice to renewal of the objection in the event that a criminal case might arise in the future.

especially where there is no pending criminal case depending on a resolution of the dispute. See, e.g., *DiBella v. United States*, *supra*, pp. 128-129, fn. 9; *Rodgers v. United States*, 158 F. Supp. 670 (S.D. Cal.), mandamus and prohibition denied, 158 F. Supp. 670 footnote p. 684 (C.A. 9th); *Centracchio v. Garrity*, 198 F. 2d 382, 386-389 (C.A. 1st), certiorari denied, 344 U.S. 866; *Chieftain Pontiac Corp. v. Julian*, 209 F. 2d 657 (C.A. 1st); *Eastus v. Bradshaw*, 94 F. 2d 788 (C.A. 5th); *Goodman v. Lane*, 48 F. 2d 32, 35 (C.A. 8th); *Austin v. United States*, 353 F. 2d 512 (C.A. 4th); *Benes v. Canary*, 224 F. 2d 470, 472 (C.A. 6th), certiorari denied, 350 U.S. 913.

Thus, in *Centracchio v. Garrity*, *supra*, (cited with approval in *DiBella v. United States*, *supra*, p. 128), a taxpayer filed a pre-indictment petition to suppress evidence allegedly obtained from him by revenue agents by deceit. The District Court denied the petition on the merits; the First Circuit vacated that order and remanded the case "with direction to enter an order dismissing the petition for want of equity." (198 F. 2d p. 389). The Court opinion (by Magruder, C.J.) observed (p. 386) that, although it could not be said that the District Court lacked jurisdiction (since a court has jurisdiction to discipline its own officers, e.g., the United States Attorney), "the propriety of exercising such jurisdiction depends upon considerations of an equitable nature." The Court concluded that the District Court (p. 388) "should have dismissed the petition as lacking in equity," having first noted that the case involved no *actual* search and seiz-

ure, and having taken the view that pre-indictment suppression should be sparingly exercised.

In *Chieftain Pontiac Corp. v. Julian*, 209 F. 2d 657, (C.A. 1st), the Court, in a similar case involving alleged false representations by revenue agents, observed (p. 659) that in *Centracchio v. Garrity*, *supra*, "we tried to indicate our lack of enthusiasm for these petitions to suppress evidence, filed at a pre-indictment stage." The Court decided that a false representation concerning eligibility for the benefits of the non-disclosure policy does not constitute an "unreasonable search and seizure" (pp. 659-660), whether or not the evidence should be admitted at a trial, and concluded by saying (p. 660) :

In thus specifying that the dismissal should be without prejudice, the district court was merely following what we said in the *Centracchio* case, 198 F. 2d at page 388, that such questions as to the admissibility of evidence which may be produced by the government at some future criminal trial ought not to be determined by the district court, or by us on appeal, upon petitions like the present ones for the suppression of evidence prior to indictment.

Although the existence of jurisdiction, the propriety of exercising it, and the right to an immediate appeal from a failure to exercise it (an ultimate appeal is always available, by appeal from conviction in a criminal case) are separate questions, they tend sometimes to merge. Thus, in *Austin v. United States*, *supra* (353 F. 2d 512), the Fourth Circuit, after the decision in *DiBella v. United States*, *supra*, reversed

its own earlier judgment (297 F. 2d 356) requiring the District Court to hold a hearing in a pre-indictment suppression proceeding, on the ground that under *DiBella* it lacked appellate jurisdiction, but added (353 F. 2d, p. 512):

This order is not intended to indicate that the District Court may not in its discretion, hear the application for injunction prior to indictment, nor do we hereby intimate any opinion upon the merits of said application.

We submit that, even if the order of the District Court in the present case is appealable, nevertheless the order was free from error.

II

The District Court Did Not Err In Dismissing the Counterclaim In the Summons Enforcement Proceeding, or In Denying the Request for a Three-Judge District Court

After the dismissal of its action seeking the suppression of evidence, Howfield, Inc. (and its president, Mr. Ahmanson), on December 29, 1967, filed an answer and counterclaim for injunctive relief (No. 22602, C. T. 48-56) in the proceeding which the Government had commenced on April 5, 1967, seeking enforcement of summonses served on Ahmanson, as president of Howfield, Inc. (No. 22602, C. T. 7-10) for the production of corporate records of Galaxy, Inc., of which Howfield, Inc., was the successor. On January 16, 1968, the District Court dismissed the counterclaim and denied the application for the convening of a three-judge district court. (No. 22602,

C. T. 83-84.) Clearly, the District Court did not err in so doing.

In Paragraph "I" through "VI" of the counterclaim (No. 22602, C. T. 51-53) appellants asserted that Section 7602 of the 1954 Code, Appendix, *infra*, is unconstitutional if construed to authorize the use of a summons by a Special Agent, and that the United States should be permanently enjoined from utilizing Section 7602 or attempting to enforce summonses issued under it, whether against Howfield, Inc., or anyone else. It was prayed that a three-judge court be convened, pursuant to Title 28 U.S.C., Sections 2282 and 2284, Appendix, *infra*.

In paragraphs "VII" through "X" of the counterclaim (No. 22602, C. T. 53-55), appellants alleged that Internal Revenue agents had obtained information (without alleging from whom they obtained it) by means of deceit, in alleged violation of the Fourth Amendment concerning searches and seizures, and that all agents having such information should be enjoined from utilizing it.

The prayers of the counterclaim (No. 22602, C. T. 55-56) repeated substantially the same requests for relief, and amounted to a request that the Internal Revenue Service be enjoined from investigating Howfield, Inc. at all, for any purpose, whether by seeking information from Howfield, Inc., or anyone else.

This conglomeration of requests calls for some separation, for purposes of analysis.

First, there are the requests that because of the alleged deceit the Government should be enjoined from enforcing the four summonses which are the subject

of the existing enforcement action. Obviously, these requests do not present a situation calling for or permitting injunctive relief or equitable intervention, since appellants had an entirely adequate remedy at law by opposing or defending against the summons enforcement petition. They have availed themselves of that remedy, subsequent to the filing of the notices of appeal in these two cases, by presenting evidence designed to show the impropriety of enforcement of the summonses. A decision on the Government's petition to enforce is being considered by the District Court. Resort to equity is unnecessary. *Reisman v. Caplin*, 375 U.S. 440. Furthermore, since there were no grounds for an injunction, the District Court could properly dismiss the counterclaim without the convening of a three-judge district court, whether or not a substantial question exists concerning the constitutionality of Section 7602. See *Carrigan v. Sunland-Tujung Telephone Co.*, 263 F. 2d 568, 572 (C.A. 9th); *Van Buskirk v. Wilkinson*, 216 F. 2d 735, 737-738 (C.A. 9th); *Jacobs v. Tawes*, 250 F. 2d 611 (C.A. 4th); *Linehan v. Waterfront Commission of New York Harbor*, 116 F. Supp. 401, 404-405 (S.D. N.Y.).

Secondly, there are the broad-scale requests, calculated, in effect, to stop all future investigation of Howfield, Inc., by enjoining all further attempts to obtain information or evidence from it or from anyone else, at least by the use of administrative summonses, and apparently even by asking for information from those who might be entirely willing to disclose it, if the desire to ask was in any way prompted by or related to any knowledge gained from the eight

checks and seven invoices, copies of which Mr. Weiss turned over on December 19, 1966 and got back on April 13, 1967. (No. 22609, C. T. 57, 96-100.)

Appellants might contend that, by opposing the existing summons—enforcement proceeding, they could not achieve the further goal of preventing the Government from getting information concerning Howfield, Inc., from various and sundry third persons, which would, as we understand the drift of their contentions, be tainted in advance unless some new agent, wholly ignorant of the eight checks and seven invoices and of everything stemming from knowledge of them, were the one seeking the new information. The answer to such ambitious contentions is, we submit, that appellants simply have no standing to prevent the *acquisition* of information from independent, third-party witnesses, regardless of any right they might have to suppress the *use* of such evidence against them if and when the Government should attempt to use it against them in some future criminal case. See *DeMasters v. Arend*, 313 F. 2d 79 (C.A. 9th); *Foster v. United States*, 265 F. 2d 183, 187-188 (C.A. 2d), certiorari denied, 360 U.S. 912; *Zimmerman v. Wilson*, 105 F. 2d 583 (C.A. 3d); *Bouschor v. United States*, 316 F. 2d 451 (C.A. 8th); *Application of Magnus*, 299 F. 2d 335, 336-337 (C.A. 2d), certiorari denied, 370 U.S. 918; *Application of Cole*, 342 F. 2d 5, 7 (C.A. 2d); *O'Donnell v. Sullivan*, 364 F. 2d 43 (C.A. 1st).

Furthermore, insofar as equity jurisdiction is concerned—and that is the jurisdiction which, essentially, appellants invoke—the same considerations of

prematurity arise as have been discussed under Part I C, *supra*, and which were noted by this Court in *Hill v. United States, supra*. The overriding fact is that as yet there is no criminal case against appellants in existence. If such a case should arise in the future, appellants will then have ample opportunity to raise objections to any and all evidence which the Government might seek to introduce against them. See Rule 41(e) of the Federal Rules of Criminal Procedure.

In sum, we submit that, from any point of view, there was no basis here—accepting all of appellants' allegations as true—for the equitable relief of injunction, and consequently there was no occasion for convening a three-judge district court, and the counterclaim was correctly dismissed.

Since appellants did not state a case for injunctive relief, and since the District Court correctly dismissed their counterclaim for that reason, there should be no occasion for exploring, here, the question of whether a substantial constitutional question was presented, which here is merely an additional reason for sustaining the District Court's refusal to seek the convening of a three-judge court. See *Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715. Nevertheless, we shall address the question briefly.

The crux of appellants' contention, concerning unconstitutionality, is (Br. 13, 18, 19) that Section 7602 authorizes a "demand" for the production of records without prior proof of probable cause for a search and seizure. This contention is, of course, wholly without

substance, since Section 7602 merely authorizes the issuance of a summons, which can be enforced only upon the Government's application to the District Court (as was done here), pursuant to Section 7402 (b) and 7604(a) of the 1954 Code, Appendix, *infra*. The person summonsed may appear and oppose the application or petition. See *Reisman v. Caplin*, *supra*. Thus, the statutory scheme requires the very intervention of a neutral judicial officer, the alleged absence of which appellants rely upon for their claim of unconstitutionality.¹⁰

Appellants also make some contention (Br. 14-15) to the effect that the "principal" or "primary" purpose of a Special Agent of the Internal Revenue Service (Intelligence Division) is to obtain evidence for a criminal proceeding. Thus, they virtually concede that such an agent also has other purposes. Even supporting, *arguendo*, that a sole purpose to investigate crime would vitiate the authority of an administrative summons, it is clear that the co-existence of a concededly valid purpose suffices to sustain the summons. See *Lash v. Nighosian*, 273 F. 2d 185 (C.A. 1st), certiorari denied, 362 U.S. 904.

In fact, this Court thoroughly analyzed this whole subject in *Boren v. Tucker*, 239 F. 2d 767, 772, and sustained an Internal Revenue summons issued (as in the present case) to determine whether tax deficien-

¹⁰ From their argument, one would suppose that appellants would prefer the drastic procedure of a search and seizure of their records, preceded only by a showing of probable cause before a magistrate at a hearing of which they had no notice.

cies existed and, if so, whether the deficiency was due to fraud, and if so, whether civil fraud penalties or criminal sanctions or both or neither should be recommended. There is little that can be added to that analysis. In a different context (the need for Fifth and Sixth Amendment warnings), this Court again evaluated the role of a Special Agent in *Kohatsu v. United States*, 351 F. 2d 898, certiorari denied, 384 U.S. 1011. Very recently, in *United States v. Mackiewicz*, F. 2d (involving the alleged lack of constitutional warnings), the Second Circuit noted the futility involved in any proposal to do away with special agents, in view of the inseparability of the criminal and civil possibilities inherent in a tax investigation. Also, it is worth noting that the Supreme Court has rather recently subjected Section 7602 and cognate sections to close scrutiny, in cases where the fraud aspect of the investigation was a central factor, but expressed no doubt as to constitutionality. *Reisman v. Caplin*, *supra*; *United States v. Powell*, 379 U.S. 48. See also *Hannah v. Larche*, 363 U.S. 420, 441, 443, upholding powers of administrative investigation against the contention that the facts uncovered might lead to criminal prosecution, and see the appendix to that decision (pp. 454-485), listing numerous statutes conferring such powers. See also, *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 195-196; *United States v. Morton Salt Co.*, 338 U.S. 632, 652.

Indeed, were it necessary to make the point, it could well be assumed that administrative investigations

are permissible even if the sole purpose were to uncover crime. We have occasionally seen arguments to the effect that there supposedly is a right to be investigated solely by a grand jury, but such arguments seem to be grounded only on the conceded rule that no one shall be put to trial on a charge of felony except on presentment by a grand jury. The summons powers conferred by Section 7602 constitute no infringement upon that bulwark of freedom, since the Internal Revenue Service, or any of its agents or officials, can do no more than merely recommend prosecution to the Department of Justice; if it agrees, the case goes to a United States Attorney for presentation to a grand jury, if the charge is of the requisite gravity, which must indict if there is ever to be a criminal trial.

In any event, contentions that special agents cannot utilize summonses because their purpose allegedly is to uncover crime have been repeatedly and uniformly rejected by the courts of appeals. See *Boren v. Tucker*, *supra*; *Wild v. Brewer*, 329 F. 2d 924 (C.A. 9th), certiorari denied, 379 U.S. 914; *Wild v. United States*, 362 F. 2d 206 (C.A. 9th); *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12, 16 (C.A. 2d), certiorari denied, 373 U.S. 902; *Wright v. Detwiler*, 345 F. 2d 1012 (C.A. 3d); ¹¹ *Sanford v. United States*, 358 F. 2d 685 (C.A. 5th); *Tillotson v. Boughner*, 333 F. 2d 515 (C.A. 7th), certiorari denied, 379 U.S. 913.

¹¹ Affirming the District Court's enforcement order, the respondent asserted the criminal-purpose argument in the District Court (241 F. Supp., p. 755).

Appellants cite (Br. 15, 21) *Camara v. Municipal Court*, 387 U.S. 523; *See v. City of Seattle*, 387 U.S. 541; and *Mancusi v. DeForte*, 36 Law Week 4682 (decided June 18, 1968). None of these cases is relevant here. The first two of these cases involve statutes making it a crime to resist entry into one's premises (for a building inspection) without a warrant. The *DeForte* case held that a subpoena was no justification for a forcible entry, search, and seizure.

We submit that no substantial question concerning the constitutionality of Section 7602 has been raised.

CONCLUSION

For the foregoing reasons, the appeal in Case No. 22609 (the action for the suppression of evidence) should be dismissed for lack of appellate jurisdiction, since the order was not a final, appealable order; if it is deemed to be appealable, then the order should be affirmed, since the District Court properly dismissed the complaint as involving merely a premature request.

The order in Case No. 22602, denying a request to convene a three-judge district court and dismissing the counterclaim for lack of equity, should be affirmed, since appellants had an adequate remedy at law by opposing enforcement of the summonses, had no right or standing to prevent the use of summonses against third parties, and in any event presented no

substantial question concerning the constitutionality of the federal statutes involved.

Respectfully submitted,

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August, 1968.

CERTIFICATE OF SERVICE

It is hereby certified that service of the Brief for the Appellees in the above-entitled cause has been made upon opposing counsel by mailing copies thereof to them, on this day of, 1968 in an envelope (with postage prepaid) properly addressed to them as follows:

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

* * * *

(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * *

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or re-

quired to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

* * * *

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) Jurisdiction of district court.

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.

Whenever any person summoned under sections 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the

judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

Title 28, United States Code:

SEC. 2282. INJUNCTION AGAINST ENFORCEMENT OF FEDERAL STATUTE; THREE-JUDGE COURT REQUIRED.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

SEC. 2284. THREE-JUDGE DISTRICT COURT; COMPOSITION; PROCEDURE.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented

shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

* * * *

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HOWFIELD, INC., formerly GALAXY, INC.,	}	No. 22609
<i>Appellant,</i>		
<i>vs.</i>		
UNITED STATES OF AMERICA, et al.,	}	
<i>Appellees</i>		

WILLIAM H. AHMANSON, as President of HOWFIELD, INC., etc.,	}	No. 22602
<i>Appellants</i>		
<i>vs.</i>		
UNITED STATES OF AMERICA, et al.,	}	
<i>Appellees</i>		

APPELLANTS' REPLY BRIEF

Consolidated Appeals from the United States District
Court for the Central District of California

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UNITED STATES OF AMERICA, et al.,	<i>Appellees</i>		

APPELLANTS' REPLY BRIEF

Consolidated Appeals from the United States District
Court for the Central District of California

FIRST ACTION — CASE NO. 22609

In its brief, the Appellee ("government" herein) contends that, (1) since "51 sheets of paper" were unilaterally returned by the Special Agents to counsel of Appellants ("taxpayer" herein), this converted taxpayer's action to one merely seeking the suppression of evidence which is not maintainable prior to indictment, and (2) that the District Court's action dismissing the taxpayer's complaint was a dismissal without prejudice which is not appealable.

With respect to both contentions, the government relies primarily on the decision of this Court in *Hill vs. United States*, 346 F.2d 175. The taxpayer contends that this reliance is misplaced since the *Hill* case, *ON ITS FACE*, involved the taxpayer's *acquiescence* in the retention by the government of copies of his books and records. Every action taken by the government in the instant proceedings including the forcible return of the "51 sheets of paper" was done without any acquiescence on the part of taxpayer.

The government's position seems to be that it is free to violate the constitutional rights of a taxpayer in the conduct of an investigation, and then should the taxpayer complain of the government's improper conduct, the government can make and retain for subsequent use whatever notes or leads it thinks desirable, and then return to the taxpayer its books or records or copies thereof. Further, the government asserts that if it returns this material upon the taxpayer's demand, the taxpayer has no right to object to the improper methods used in the investigation until after indictment at which time the taxpayer may properly seek to suppress any illegally obtained evidence. The government's corollary position appears to be that only if it decides not to return the taxpayer's material, does the taxpayer have the right to maintain an action seeking the return and suppression of illegally obtained evidence prior to indictment.

Taxpayer submits that it is well established, although there is authority to the contrary, that American citizens have the right not to be indicted on the basis of illegally obtained evidence, and that standing exists to enjoin the use of such illegally obtained evidence prior to indictment. *Perlman vs. United States*, 247 U.S. 7 (1948); *Burdeau vs. McDowell*, 56 U.S. 465 (1921). The cavalier

manner by which government counsel ignores this right of taxpayers not to be improperly indicted, points out the need for this Court's restatement of this principle.

The *DiBella* case, *DiBella vs. United States*, 369 U.S. 121, 131 so often cited by the government for the proposition that these proceedings are not appealable, is a further demonstration of the implausibility of the government's position. *DiBella* merely holds that no appeal will lie if the attempted appeal is "but a step in the criminal case preliminary to the trial thereof." Neither *DiBella* nor *Hill* remotely support the government's contention that the dismissal of the taxpayer's complaint was within the discretion of the District Court.

In *Goodman vs. United States*, 369 F.2d 166, this Court specifically held that copies as well as the originals from which they were made must be returned if the originals were seized in violation of a taxpayer's constitutional rights. In reaching this decision, this Court clearly distinguished *Hill* on the same basis that the taxpayer urges in these proceedings, i.e., that in *Hill*, the taxpayer voluntarily turned over copies of his records to the government. In the instant case, while it may or may not be true that the government returned all copies of the taxpayer's books and records furnished by taxpayer's counsel, as well as copies thereof made by the government, it would be a nonsensical rule for the government to be permitted to make and retain notes of the contents of the material it returned. As this Court recognized in *Goodman* when it quoted from *Silverthorne Lumber vs. United States*, 251 U.S. 385, 392: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."

As this Court also pointed out in *Goodman*, this appeal lies since “common sense tells us that this is not merely another step in a criminal case for the simple reason that there is, and has been, no criminal case pending in any stage. Where no criminal action is pending at the time the moving party institutes a proceeding to suppress evidence, the proceeding is considered an independent suit in equity and the Court’s order therein is appealable as a final decision. *United States vs. Rosenwasser*, 145 F.2d 1015, 156 ALR 1200 (9th Cir. 1944). In *Hill*, we noted that *DiBella vs. United States*, 369 U.S. 121, 82 S. Ct. 654, 7 L. ed 2d 614 (1962), had added the requirement that the movant or petitioner be seeking the return of property in addition to suppression. But as shown above, the appellants are entitled to have the copies turned over to them, as they requested, if the searches or seizures are found to have violated the Fourth Amendment.

“Therefore we conclude that the order of the Court below was final and that this Court had jurisdiction of the appeal under 28 U.S.C. §1291”.

The taxpayer submits that common sense also dictates that if the taxpayer’s constitutional rights were violated by the government in its acquisition of the taxpayer’s books and records, the originals, copies thereof made by the taxpayer, copies thereof made by the government, as well as pencil notes or any other record made by government agents of this material is all equally tainted. In addition, it is well established that all leads obtained from tainted evidence, or fruit of the poisonous tree, is as inadmissible as the tainted evidence itself.

Nor is the government’s position aided by the decision in *Maryland Penitentiary vs. Hayden*, 387 U.S. 294 since that case simply removed the limitation against “mere

evidence” being obtainable as a result of an authorized search. If anything, that case demonstrated that old fictions based upon common law property rights are no longer necessary as a basis for determining whether illegally seized evidence should be suppressed.

The District Court erred in dismissing taxpayer’s complaint in 22609. The District Court had jurisdiction, and the taxpayer should have been permitted, as the moving party, to attempt to demonstrate and establish the method and manner by which its constitutional rights were violated. The taxpayer is not required to sit idly by and await an indictment before having the right to bring an action to have its illegally seized property returned as well as having the illegally seized evidence suppressed.

SECOND ACTION — CASE NO. 22602

The government’s primary position with respect to the taxpayer’s counterclaim and application for convening a Three-Judge District Court is that the District Court’s dismissal of the counterclaim and denial of the application was correct since “appellants had an entirely adequate remedy at law by opposing or defending against the summons enforcement petition”. (Gov’t Brief p. 22.) The government concluded further that since the taxpayer has defended against the enforcement of the summons by presenting evidence in proceedings before a one judge District Court, and since a decision in this regard is pending, “resort to equity is unnecessary”. (Gov’t Brief p. 22.)

It is submitted that the government does not have the right to select or determine the relief which the taxpayer may seek. Furthermore, the government’s suggestion that the taxpayer’s attempt to obtain injunctive relief, in addition to being excused from complying with the

summonses served upon the taxpayer, was "too ambitious" is inappropriate. The taxpayer in its counterclaim set forth various requests for equitable relief, in addition to the prayer that the Court enjoin the government's intended use of a statute which the taxpayer contended was unconstitutional. The taxpayer is certainly entitled to make the assertion and then attempt to establish that its rights would not be adequately protected if it was only excused from complying with the summons. Neither the government nor the District Court should have the right to limit *in advance* the scope of the relief which the taxpayer in its best judgment felt it was entitled to seek. The taxpayer did not and does not have an adequate remedy at law merely by being relieved from complying with the summons served upon it, since the only way the taxpayer can insure that all forms of fruit of the poisonous tree may not be used against it is by the obtaining of the injunctive relief which it seeks. In addition, the taxpayer plainly has the right to assert the unconstitutionality of the statute. Under Section 2282 of Title 28 of the United States Code, only a Three-Judge District Court can make this determination.

The cases cited by the taxpayer in their opening brief make it clear that the District Court patently erred in dismissing taxpayer's counterclaim and application for Three-Judge District Court. This error could not be cured by the one Judge District Court deciding this case on the basis of evidence presented to him. Rather the only decision he was required to make was whether a substantial constitutional issue was presented. This Court, on August 19, 1968, reaffirmed the rule that only where the constitutional issue raised was "plainly unsubstantial" should an application for Three-Judge District Court be denied. *Gilmore vs. Lynch* F.2d (No. 22052,

9th Cir. 8/19/68). In reaching this decision, this Court quoted from *Ex Parte Poresky*, 290 U.S. 30, 32 (1933) as follows:

“ ‘The question may be plainly unsubstantial, either because it is ‘obviously without merit’ or because ‘its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.’ ” 290 U.S. at page 32.’ ”

In the instant proceedings, the District Court refused to make a determination whether the taxpayer’s claim of unconstitutionality was “plainly unsubstantial.” Rather than making this determination, which determination would be reviewable upon appeal by this Court, the District Court improperly concluded that the taxpayer did not have a right to seek equitable relief since an adequate remedy at law existed. The District Court stated that the adequate remedy at law consisted of the taxpayer’s right to defend against the government’s summons enforcement petition, and the right to appeal if the summonses were ordered enforced.

In *Schneider vs. Rusk*, 372 U.S. 224 (1963), the plaintiff sought to enjoin the enforcement of an Act of Congress which provided that a naturalized American citizen shall lose his citizenship by “having a continuous residence for three years” in the place of his birth. The only difference between *Schneider vs. Rusk* and the instant proceedings is that in that case the plaintiff was not defending an action brought by the government to divest him of his citizenship. There is no rational basis to hold that where a citizen is being threatened by governmental action, the propriety of which action is being challenged on constitutional grounds, that only the plaintiff — as dis-

tinguished from defendant — citizen has the right to a Three Judge District Court determination of the constitutionality of the statute. As enunciated so clearly in the cases cited herein as well as in the taxpayer's opening brief, the rule is otherwise. If the District Court determines that the constitutional issue was not "patently unsubstantial," the Court was without jurisdiction to do anything but notify the Chief Judge of this Circuit who should then have appointed a Circuit Judge and another District Judge who would then have constituted the Three-Judge District Court. Title 28 USC §2284.

The government contends that the taxpayer's attempt to invoke the equity jurisdiction of the Court is premature since there is no criminal case against the taxpayer presently in existence. The government further contends that the taxpayer's sole remedy is under Rule 41(e) of the Federal Rules of Criminal Procedure. The government thus maintains that the taxpayer cannot raise a constitutional question in defense of an action brought by the government seeking enforcement of these summonses. The government is seeking to have this Court hold that a taxpayer being investigated has absolutely no right of defense or relief available prior to indictment.

It is respectfully submitted that the state of the law has not developed to the point where a citizen cannot challenge the constitutional authority of the government in a matter directly affecting the life, liberty or property of that citizen in an action brought against him by the government.

The recent Supreme Court cases cited by the taxpayer make it abundantly clear that the trend towards expansion of taxpayers' rights has begun and that the time has come for this Court to state in unequivocally clear terms that taxpayers have constitutional rights which may not

be violated by the Internal Revenue Service, notwithstanding its important purpose of collecting revenue.

The District Court patently erred by dismissing taxpayer's counterclaim and application for convening Three-Judge District Court and by refusing to determine whether a substantial constitutional question had been raised. The subsequent proceedings and trial held by the District Court were a nullity and were without jurisdiction. This Court should determine that this matter be remanded with instructions to the District Court to notify the Chief Judge of this Circuit so that a Three-Judge District Court may be convened. This Three-Judge District Court would hear and determine not only whether Section 7602 of the Internal Revenue Code is unconstitutional, but all of the other issues presented by the pleadings.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUL 11 1968

UNITED STATES OF AMERICA,

Appellant,

v.

HOUSING AUTHORITY OF THE CITY OF BREMERTON,
A PUBLIC BODY POLITIC AND CORPORATE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WASHINGTON

BRIEF FOR APPELLANT

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JUL 11 1968

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,611

UNITED STATES OF AMERICA,

Appellant,

v.

HOUSING AUTHORITY OF THE CITY OF BREMERTON,
A PUBLIC BODY POLITIC AND CORPORATE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WASHINGTON

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This action was brought by the United States pursuant to the Medical Care Recovery Act, 42 U.S.C. 2651, to recover the value of certain medical care furnished by the United States. The district court, by order of December 5, 1967, dismissed the action (R. 48). On February 2, 1968, the United States filed a notice of appeal (R. 49). This Court has jurisdiction of the appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Roger B. Thomas, an enlisted man in the United States Navy, lived with his wife and their 18-month-old daughter Carrie in the West Park housing project in Bremerton, Washington. The housing project was in the possession and under the control of the defendant-appellee, the Housing Authority of the City of Bremerton and Roger Thomas had leased an apartment from the Authority.

On July 17, 1963, during the regular lease term, Carrie Thomas opened the hot water faucet in the bathroom sink and the outflow of water at a high temperature severely burned her. Because Carrie was the minor dependent daughter of an enlisted man on active duty in the Navy, the United States was required by law to furnish, and did furnish, hospital, medical, and surgical care for treatment of the injuries caused by the scalding water.

On September 5, 1963, Carrie Thomas, by her guardian ad litem, Robert B. Thomas, brought suit in the Superior Court of the State of Washington against the Housing Authority. ^{1/} After a trial, the jury found that the accident had been caused by the negligence of the Housing Authority, and on June 7, 1965, the Superior Court entered judgment in favor of Carrie Thomas for

^{1/} This lawsuit was Cause No. 44055, in the Superior Court of the State of Washington in and for the County of Kitsap (R. 32).

\$50,000. The judgment noted that the court had "rejected during the trial the plaintiff's offer of proof as to the reasonable value of hospital and medical services rendered the minor plaintiff", and went on to state that the award of damages did not include "any hospital or medical expenses rendered the minor plaintiff by any United States Government operated hospital" (R. 32-33). The judgment of the Superior Court was affirmed by the Supreme Court of Washington on April 13, 1967 in Thomas v. Housing Authority of the City of Bremerton, 71 Wash. 2d 67, 426 P. 2d 493.

On September 21, 1965, the United States filed its complaint in the United States District Court in the present action, seeking, pursuant to the Medical Care Recovery Act, 42 U.S.C. 2651, to recover the reasonable value of the care and treatment afforded by it to Carrie Thomas (R. 1-2). The defendant Housing Authority answered, and the parties stipulated that the reasonable value of the care and treatment furnished by the United States to Carrie Thomas was \$3,275 (R. 5, 29-30).

On December 5, 1967, the court ruled (1) that the United States should have intervened in the state court action brought by Thomas on his daughter's behalf within six months after the United States had first furnished medical care, and (2) that the failure of the United States to intervene barred it from bringing the present action against the Housing Authority (R. 47-48).

STATUTE INVOLVED

The Medical Care Recovery Act, 42 U.S.C. 2651-2653, provides in pertinent part:

§ 265. Recovery by United States -- Conditions; exceptions; persons liable; amount of recovery; subrogation; assignment

(a) In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances creating a tort liability upon some third person (other than or in addition to the United States and except employers of seamen treated under the provisions of section 249 of this title) to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished. The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, as appropriate, to assign his claim or cause of action against the third person to the extent of that right or claim.

Enforcement procedure; intervention; joinder of parties; State or Federal court proceedings

(b) The United States may, to enforce such right, (1) intervene or join in any action or proceeding brought by the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, against the third person who is liable for the injury or disease; or (2) if such action or proceeding is not commenced within six months after the first day in which care and treatment is furnished

by the United States in connection with the injury or disease involved, institute and prosecute legal proceedings against the third person who is liable for the injury or disease, in a State or Federal court, either alone (in its own name or in the name of the injured person, his guardian, personal representative, estate, dependents, or survivors) or in conjunction with the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors.

*

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SPECIFICATIONS OF ERROR

1. The district court erred in holding that the United States was barred from bringing this action because of its failure to intervene in the earlier action brought against the tortfeasor by the injured party within six months of the date medical care was first furnished by the United States.

2. The district court erred in refusing to hold on the present record that the United States was entitled to judgment of \$3,275.

SUMMARY OF ARGUMENT

I

Congress enacted the Medical Care Recovery Act to give the United States an independent right to recover from third-person tortfeasors the cost of the medical care it furnishes to persons injured under circumstances creating a tort liability upon such third persons. The district court misconceived the effect and purpose of 42 U.S.C. 2651(b) in reading that subsection so as to forfeit the independent right of the United States to reimbursement under the Act merely because it failed

to require the United States to join in the earlier action brought by the injured party against the tortfeasor.

II

The Housing Authority fully concedes that the United States was required by law to furnish medical care to the injured person, that her injuries had arisen under circumstances establishing liability of the Housing Authority to pay damages for those injuries, and that the fair value of the medical care furnished by the United States was \$3,275. Accordingly, the district court plainly erred in failing to enter judgment for that sum in favor of the United States, since the Housing Authority has admitted all of the operative facts necessary for recovery under the Medical Care Recovery Act.

ARGUMENT

I

THE DISTRICT COURT ERRED IN HOLDING THAT
THE PRESENT SUIT WAS BARRED BECAUSE THE
UNITED STATES HAD FAILED TO INTERVENE IN
THE INJURED PERSON'S STATE COURT ACTION.

A. The Act Gives The United States An Independent Right To Reimbursement.

Congress enacted the Medical Care Recovery Act in response to the Supreme Court's 1947 decision in United States v. Standard Oil Company, 332 U.S. 301. In that case, the United States sought to recover for hospitalization and medical care furnished to a soldier injured as a result of the negligent operation of a Standard Oil Company truck. The United States contended that

the company was liable in damages to it for interference with the Government-soldier relationship and the consequent loss to it.

The Court refused to impose such a liability, noting that it was the function and responsibility of Congress to prescribe such liability on the part of the tortfeasors to the United States for medical expenses. In its opinion, the Court also significantly noted that the United States' claim was "not one for subrogation", but was "rather for an independent liability owing directly to itself as for deprivation of the soldier's services and 'indemnity' for losses caused in discharging its duty to care for him consequent upon the injuries inflicted by [the company]." 332 U.S. at 304, note 5. It recognized that "the United States has power at any time to create the liability", 332 U.S. at 316, and agreed that the creation and regulation of such a liability would not be determined by state law. 332 U.S. at 306. The Court viewed the issue as coming "down in final consequence to a question of federal fiscal policy", and, as already noted, in refusing "to make the determination that liability exists", held that that decision was for the Congress, not for the courts. 332 U.S. at 314, 316-317. The Court, in thus remitting the matter to Congress, stated (332 U.S. at 314-315):

Congress, not this Court or the other Federal courts, is the custodian of the national purse. By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs. And these

comprehend, as we have said, securing the treasury or the government against financial losses however inflicted, including requiring reimbursement for injuries creating them, as well as filling the treasury itself.

In a 1960 report to Congress, which summarized the results of a study by the General Accounting Office concerning reimbursement of the Government for medical care furnished to those injured through the negligence of third persons, the Comptroller General urged legislation which would enable the Government to recover such costs from tortfeasors. Report of the Comptroller General of the United States, "Review of the Government's Rights and Practices Concerning Recovery of the Cost of Hospital and Medical Services in Negligent Third-Party Cases." See H. R. Rep. No. 1534 87th Cong., 2d Sess., pp. 5, 15. Congress then considered a number of bills, and in 1962 enacted the Medical Care Recovery Act, 42 U.S.C. 2651-2653.

The language of the Act demonstrates that it was Congress' intent to create a separate, distinct, and independent right of recovery in the United States against a tortiously liable third person. For example, 42 U.S.C. 2651(a), which is entitled "Recovery by United States", provides expressly, among other things, that "the United States shall have a right to recover from [a tortiously liable] third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured * * * person * * * has against such third

person to the extent of the reasonable value of the care and treatment so furnished or to be furnished." (Emphasis added.) Thus, under the language of the Act, the United States has a right to recover directly from the tortiously liable third person and is, in addition, subrogated to the injured person's claim of tort liability in order to further implement and protect its right to recovery.

The legislative history of the Act fully confirms the independent nature of the Government's right to recovery. As introduced in the House of Representatives, H.R. 298, the bill which ultimately became the Medical Care Recovery Act, gave the United States a derivative right only. For instance, Section 1(a) of that bill provided only that "the United States shall be subrogated to any right or claim that the injured * * * person * * * has against such third person with respect to the care and treatment so furnished or to be furnished." 108 Cong. Rec. 6669. Hearings were held on H.R. 298, and the bill was reported out by the House Committee on the Judiciary with amendments. 108 Cong. Rec. 6669-6670. Those amendments were in part designed to create in the United States an unequivocal and independent right of recovery. This right was specifically created by adding immediately before the provision regarding subrogation in Subsection (a) new language stating that the United States "shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right," etc.

[then follows the language granting the subrogation remedy]. Indeed, the House Committee's report consistently emphasizes its intent to give the United States an independent right to recover by this language. See H.R. Rep. No. 1534, supra, pp. 2-4.

H.R. 298 was passed by the Senate without further amendment. S. Rep. No. 1945, 87th Cong., 2d Sess., p. 4.

In light of the explicit language of the Act and its legislative history, it is not surprising that the three appellate court decisions passing on the nature of the Government's right to recover under the Act squarely hold that Section 2651(a) gives the United States -- in addition to its subrogation rights -- an independent, non-derivative right to recover.

Indeed, the most recent of these opinions, United States v. Merrigan, 389 F. 2d 21 (C.A. 3), turns on precisely the same issue here presented for decision and is, as discussed more fully infra at p. 12 , in all respects on all fours with the present case. Thus, the opinion reiterates: "Subsection (a) of the Medical Care Recovery Act unmistakably confers on the government what the congressional reports describe as an 'independent right of recovery' from the tortfeasor of the reasonable value of the care and treatment it furnishes to the injured person." 389 F. 2d at 23. Accord: United States v. Fort Benning Rifle and Pistol Club, 387 F. 2d 884 (C.A. 5); Tolliver v. Shumate, _____ W. Va. _____, 150 S.E. 2d 579. See also Government Employees Insurance Co. v. United States, 376 F. 2d 836, 837 (C.A. 4); Maddux v. Cox, 382 F. 2d 119, 123-124 (C.A. 8).

B. 42 U.S.C. 2651(b) Does Not Require The United States To Become A Party To An Action Brought By The Injured Person Within The Six-Month Period In Order To Enforce Its Reimbursement Right.

It is clear from the foregoing that 42 U.S.C. 2651(a) creates an independent, non-derivative right of recovery in the United States. We turn then to the question as to whether Section 2651(b), which is written in permissive terms, cuts down the government's right of action established in Subsection (a). The district court held that the language of Subsection (b) is mandatory rather than permissive, in that it requires the United States to join in any action brought by the injured party within the six-month period or else lose completely its right to recover.

This holding of the district court prohibiting an independent suit by the United States where the injured party has brought his own suit within the six-month period runs contrary both to the wording of the statute and to the purpose of the Act in creating an independent remedy in the United States.

Congress employed the permissive word "may", not the mandatory word "shall", in 42 U.S.C. 2651(b). Thus, under the statute, the United States has an option to intervene or join in an action brought by the injured person within the six-month period, but does not lose the right to maintain an independent action (granted in Section 2651(a)) by failing to exercise this option.

Direct and strong support, confirming the correctness of this position, is found in the Third Circuit's opinion in

United States v. Merrigan, 389 F. 2d 21 (C.A. 3), the only appellate case which directly passed on the question here presented. There, as here, the government furnished medical care to the injured party, who then brought his own suit within the six-month period; final decision in that suit was reached before the government started its own suit. The court of appeals reversed the district court's dismissal of the government's action. It held, 389 F. 2d at 25, upon a complete discussion of the statutory language and the purposes of the Act, that the six-month provision means

* * * only that the government must wait for six months to afford the injured person the opportunity to bring his action first. When he does sue, the government may intervene at any time, even after the six months period has expired. It may intervene even though the injured person's action was brought after the six months period had run. This leads inescapably to the conclusion that although the government may not bring its independent action until six months have gone by, that period does not mark a kind of partial statute of limitations against the assertion of its independent right of action. It may at any time after six months bring its action even if the injured person has already brought suit for his damages within the six months period. [Emphasis added.]

Accord: United States v. Wittrock, 268 F. Supp. 325 (E. D. Pa.).

2/ Contra: United States v. York, 261 F. Supp. 461 (W. D. Tenn.), which we think was incorrectly decided and which is pending on our appeal to the Sixth Circuit, No. 18,001.

In reaching the contrary result -- without the benefit of the Third Circuit's holding in Merrigan^{3/} -- the court below sought to justify its restrictive reading of the Act's provisions by relying on "two basic considerations" (R. 46). But neither of these considerations withstands analysis when measured against the statutory language and purpose. The first of the "considerations" was that "an interpretation permitting the Government to bring its own action after the completion of litigation between the victim and the tort-feasor would unnecessarily subject the latter to multiple litigation." (Ibid.). However, as the Merrigan opinion points out, the statute in other situations clearly contemplates such separate actions by government and injured person against the tortfeasor. For instance, if six months pass without suit by the injured party, the United States may then sue the tortfeasor; after a final judgment in that suit has been handed down, nothing in the Act prevents a separate suit by the injured person. Similarly, if, after the six months had expired, the injured party brought an action against the tortfeasor and recovered a judgment, nothing in the Act would prevent a subsequent suit by the United States. Indeed, the ability to bring such suits separately is a hallmark of the independence of the rights of recovery of the injured person and the United States. "Thus", as the Third Circuit concluded

^{3/} Merrigan was decided on January 18, 1968; the district court's opinion in the present case was handed down on December 5, 1967.

in Merrigan, 389 F. 2d at 24-25, "the fundamental purpose of subsection (b) must be something quite different from the prevention of the maintenance of two concurrent actions against the tortfeasor, one by the government for the recovery of the value of medical care and treatment it has furnished and the other by the injured person for the damages inflicted on him." 4/

The second "consideration" assigned by the district court for its result is that under the government's construction of the Act there is "no need or function for the conditional clause which introduces subsection 2651(b)(2). * * * Under the familiar rule of statutory construction that the courts must interpret a statute in a manner which gives meaning to all portions thereof, this court must reject the interpretation urged by the United States." (R. 47).

The district court failed to recognize, however, that the government's interpretation does give significant meaning to this language. The effect of 2651(b)(2), in our view, is to force the United States to wait six months before it may bring

4/ The opinion of the district court in the present case states that it found no "explicit authorization" in Section 2651(b) for a suit by the United States in the situation presented here. However, as we have demonstrated, supra, at pp. 6-10, the creation of the right, and the concomitant authorization to recover, are found in Section 2651(a), which states explicitly: "* * * [T]he United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished * * *." [Emphasis added.]

an independent action. This allows the injured person to sue first. The legislative history fully supports our construction of the statute. The Comptroller General by letter recommended the addition of this feature to the Act: "The first portion of [an earlier version of 2651(b)(2)] * * * apparently would permit the Government to take immediate action against the liable third person without permitting the injured or diseased person an opportunity to settle the claim himself. * * * The Committee may wish to consider the desirability of including in the bill * * * a provision reserving to the injured or diseased person a specific period of time in which he may attempt to settle the claim." H.R. Rep. 1534, 87 Cong., 2d Sess., at p. 16.

In sum, then, Section 2651(b)(2) under our interpretation does have a very significant effect within the Act's framework. It certainly was not intended, however, to diminish the right of recovery granted by Section 2651(a), other than to require the United States to wait, at most, six months before filing its action. It follows that the district court erred in holding that the United States was barred from bringing the present action.

II

THE DISTRICT COURT ERRED IN REFUSING TO HOLD AS A MATTER OF LAW ON THE PRESENT RECORD THAT THE UNITED STATES WAS ENTITLED TO A JUDGMENT OF \$3,275.

The district court, having erroneously ruled that the United States was barred by time from bringing this action, refused to consider the question of whether the Housing Authority

may interpose the defense of the "contributory negligence" of the parents of Carrie Thomas. It is our position that whether or not such "contributory negligence" exists here is irrelevant to the present action, and that on the present record the United States is entitled to recover the stipulated value of the medical care furnished to Carrie Thomas.

The relevant portion of Section 2651(a) states:

In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment * * * to a person who is injured or suffers a disease * * * under circumstances creating a tort liability upon some third person * * * to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished * * * and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished * * *.

As we have demonstrated above at pp. 6-10 , this language creates an independent right of recovery in the United States. By the plain terms of the statute, this independent liability arises where medical care furnished by the United States to a person who is injured or suffers a disease has been occasioned by the act of a third party which has created a liability in the third person to pay damages for the injury or disease. These straightforward requirements have been admitted or stipulated in the present case. The Housing Authority has agreed that the United States was obligated to supply medical

care and treatment to Carrie Thomas (R. 37), that its negligence proximately caused the injuries of Carrie Thomas, creating a liability to pay damages therefor (R. 36-37), and that the reasonable value of the medical care and treatment furnished to Carrie Thomas by the United States as a result of the injuries was \$3,275 (R. 30). It necessarily follows, we submit, that the district court erred, upon the present record, in failing to enter judgment of \$3,275 in favor of the United States.

The Housing Authority contended below that under Washington law the parents of a minor child are responsible for the child's medical expenses, and that in any suit brought by the parents to recover such expenses, the parents would be subject to the defense of their own contributory negligence (R. 20). From this statement the Housing Authority argued that the only suit for recovery of medical care expenses of a minor in Washington may be brought by the minor's parents, and that therefore the United States must also be subject to the defense of the parents' contributory negligence.

Even if its statement of the Washington law is correct (which we contest; see footnote 6, infra), the Housing Authority's argument has no merit. The Housing Authority argues that under state law only the parents could have recovered, and that therefore the United States must take subject to defenses which are good against the parents. In a word, the Housing Authority argues that the United States is, at best, subrogated to the rights of the parents to recover under state law.

As we have demonstrated, however, the right of the United States to recover under the Act is an independent right, defined by 2651(a) and not limited to a third party's right to recover under state law. As stated by the Third Circuit in United States v. Merrigan, supra, 389 F. 2d at 24: ^{5/}

The right of recovery [under the Act] was * * * conferred on the government and subrogation was made one of the remedial consequences of the government's right, a subsidiary equitable remedy, which did not limit the primary right. [Emphasis added.]

Indeed, the present case well illustrates the soundness of Congress' grant of an independent right of recovery to the United States, for the state rule as expressed by the Housing Authority presupposes that the Thomases were initially responsible for Carrie's medical expenses; the real situation, however, was that the United States, and not the parents, was responsible for those expenses because of its obligation to furnish medical care. In short, the Act, in providing an independent remedy to the United States, has done no more than recognize that the United

^{5/} Accord: Tolliver v. Shumate, ____ W. Va. ____, 150 S.E. 2d 579, in which the West Virginia Supreme Court of Appeals held that state law as to the accrual of a right of action for medical expenses and the power of the injured person to assign such right of action did not limit the right of the United States to recovery under the Medical Care Recovery Act.

states has incurred certain obligations under federal law to provide medical care and that such federal obligations may displace similar duties under state law. That governmental obligation here did render irrelevant the Thomases' duty under state law to provide medical care for their daughter, and the Act recognizes this fact by granting an independent right of recovery to the United States. ^{6/}

As we have stressed above, on the facts admitted or stipulated in the present record the United States should have been granted judgment as a matter of law for the sum of \$3,275. To hold otherwise would penalize the United States for actions not its own, and would give a windfall to the Housing Authority, relieving it from damages on account of an injury for which, it has admitted, it was legally responsible.

Nor would the result differ under the law of Washington. That state's law makes it clear that where "* * * [T]he action for wrongful death or injury to a child is brought by a parent for his own benefit, the contributory negligence of the parent, the actual plaintiff, will of course bar a recovery." Hilstad v. City of Seattle, 149 Wash. 483, 271 P. 2d 264, 265 (quoting from Fregg v. King County, 80 Wash. 196, 141 P. 340, 344; emphasis added). See McCandless v. Inland Northwest Film Service, Inc., 4 Wash. 2d 523, 392 P. 2d 613 (action by parents for wrongful death of child); Cox v. Hugo, 52 Wash. 2d 815, 329 P. 2d 467 (action by parents for medical expenses). The rationale of such cases is clearly that the parents should not benefit by their own wrong. Just as clearly, the defense of the contributory negligence of the parents would not be available to a defendant where the parents had not brought the suit for their own benefit. This, of course, is the situation here. See, e.g., Vioen v. Cluff, 9 Wash. 2d 306, 418 P. 2d 430, in which the defense of the contributory negligence of the parents was held unavailable to the defendant because the suit, which specifically included a request for special damages in addition to general damages (see 418 P. 2d at 432), was brought by the child (through his parent as guardian ad litem).

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court be reversed, and this cause be remanded with instructions to enter a judgment in favor of the United States in the sum of \$3,275.

Respectfully submitted,

EDWIN L. WEISL, Jr.
Assistant Attorney General

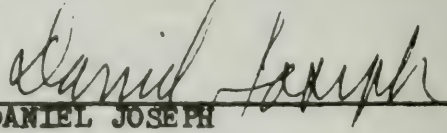
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JULY 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



DANIEL JOSEPH
Attorney
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AFFIDAVIT OF SERVICE

WASHINGTON

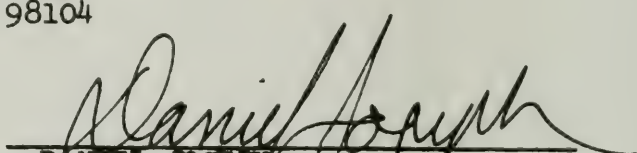
DISTRICT OF COLUMBIA

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That on July 10, 1968, he caused one copy of the foregoing
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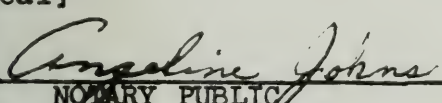


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Subscribed and sworn to before me

this 10th day of July, 1968.

[seal]



NOTARY PUBLIC

My Commission expires April 14, 1972.

IN THE
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

v.

HOUSING AUTHORITY OF THE CITY OF BREMERTON,
A PUBLIC BODY POLITIC AND CORPORATE,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLEE

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IN THE
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Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The appellee agrees with the statement of the case set forth on pages 2 and 3 of the appellant's brief, with the following clarification:

1. It is undisputed that the state court action was prosecuted on behalf of an 18-month-old child (legally incapable of contributory negligence), for her general damages only and that the defense of contributory negligence was not, therefore, available. (*Thomas v. Housing Authority of the City of Bremerton*, 71 Wn.2d 67, 426 P.2d 493.

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2. It is further undisputed that two questions of law were submitted to the trial court for decision. The first related to the nature and extent of the remedy of the United States granted under the Medical Care Recovery Act, 42 U.S.C. 2651. The second question is whether the defense of contributory negligence of the parents of the minor child is available as a defense to this action seeking recovery of the fair value of medical services rendered the child. This issue was not involved in the state court action and was specifically not passed upon by the trial court in the instant litigation in view of the District Court's opinion that the United States had failed to comply with the mandatory requirements of the Medical Care Recovery Act (R. 47-48). The parties have stipulated to submit the issues to this court upon the record herein and the District Court's Memorandum Decision of December 5, 1967.

SUMMARY OF ARGUMENT

I

Congress enacted the Medical Care Recovery Act to give the United States a right to recover from third party tort feasons the cost of medical care it furnishes to persons injured under circumstances creating a tort liability. The right did not exist prior to the enactment of the act. The District Court properly construed the effect and purpose of 42 U.S.C. 2651 (b) and, therefore, properly dismissed this action as a matter of law.

II

The fact that appellee, the Housing Authority, concedes that the United States was required by law to furnish the medical care here involved, does not mean that appellee

concedes that the defense of contributory negligence is not available to it in the instant suit. Nothing in the Medical Care Recovery Act purports to change the substantive law of the State of Washington concerning the availability of this defense.

ARGUMENT

I. The District Court Properly Held That the Present Suit Was Barred Because the United States Failed to Intervene in the State Court Action.

The relatively narrow question raised for this Court's determination is whether or not the United States is barred from bringing this action by reason of its failure to intervene in the state court suit, which was brought within six months of the date services were first rendered, and of which the United States had actual knowledge.

The District Court concluded that the United States can bring its own action against the tort-feasor *only* where no suit has been commenced by the injured party within six months after the first day in which care and treatment is furnished by the Government; and that if (as here) such suit is brought by the injured party within six months, the United States *must* intervene if it wishes to assert a claim.

It is acknowledged that in rendering its opinion, the District Court did not have available the Third Circuit Court opinion in *United States v. Merrigan*, 389 F.2d 21 (C.A. 3), nor, that the Government, at the time of writing its appellant brief herein, had available to it the Sixth Circuit Court opinion in *United States v. York* (C.A. 6, No. 18001, filed with the Clerk of Court on July 24, 1968). Each of these opinions reaches a result contrary to the

opinion of the District Court in this action. Consideration of each opinion, therefore, is in order.

The relevant portions of the Medical Care Recovery Act, 42 U.S.C. Sec. 2651 are set forth verbatim on pages 4 and 5 of the appellant's brief. The statute is, unfortunately, ambiguous. To come directly to the point and state the obvious, had the Congress used the word "shall" instead of "may" in the introductory language to Section 2651 (b), there would be no issue between the parties and we believe the Government would acknowledge that its claim was barred by reason of its failure to intervene in the state court action.

The Court in the *Merrigan* decision first considers the problem as to whether or not the Act creates a right in the Government completely independent of the injured person's claim (free from all classical concepts of subrogation).

It concludes that there is no element of subrogation or derivative rights involved. From this premise it then considers the six month provision, grapples with the problem that the plain language of the statute poses, and apparently comes up with no other solution than to hold that "the truth of the matter is that the six month provision is an incongruous residue left in the statute from the earlier intention to provide to the Government no more than a derivative right of subrogation." This, it is respectfully submitted, is a rather strained and peculiar interpretation of clear statutory language.

Appellee contends that if the Act is to have meaning, its individual parts must logically be construed to render the entire wording meaningful. In this sense, the Act cer-

tainly creates a new right in the Government to assert a claim and to enforce the claim in its own name in a separate suit (in some circumstances). Nothing, however, is stated in its language that purports to change the fact that the right is necessarily derivative through the Government's relationship with the injured person.

The effect of the Court's reasoning permitted it to disregard the mandatory requirements of the six month provision and permit recovery by the Government. This amounts to no more nor less than a judicial legislation, specifically prohibited by the United States Supreme Court in *United States v. Standard Oil Co.*, 332 U.S. 301.

A far more logical and reasonable interpretation is placed on the pertinent sections by the trial court wherein it recognizes the right of the United States to bring an independent action but further recognizes that the right granted by the statute is explicitly limited to cases in which the victim has not himself brought suit within the six month period. Thus where the victim has brought such an action, the United States has no explicit authorization from the statute to bring its own action. We agree with the interpretation of Judge Beeks: "If Congress had intended to permit the United States to enforce its right by an independent suit irrespective of whether the victim brought a suit within the six month period, there would have been no need or function for the additional clause which introduces subsection 2651 (b) (2). Had such been Congress's intention, it would have dispensed with the entire clause. Under the familiar rule of statutory construction that the courts must interpret a statute in a manner which gives meaning to all portions thereof, this court

must reject the interpretation urged by the United States.” (R. 47).

We further agree with and urge upon this Court the reasoning contained in Judge Hastie’s dissent to the *Merrigan* decision, which appeared in the advance sheet publication but not in the Federal Reporter bound volume;

“As the majority opinion states, the Medical Care Recovery Act, 42 U.S.C. 2651, was enacted to give the United States a statutory right to recover for certain medical services where the Supreme Court had held that such a right could not be created by judicial fiat, *United States v. Standard Oil Co.*, 1947, 332 U.S. 301. However, as I read the legislative text, the Act is so phrased and arranged that, although the government is enabled to recover in specified circumstances, no remedy is provided for the situation presented by the present case. This may reflect poor draftsmanship or inadvertence. But, in my view, the courts have no more authority to supply a remedy in circumstances not specified in the Act than they had to give relief before the statute was enacted. . .

“The majority believe it is fair and sensible to afford the government a remedy by way of a separate action in the present situation even though a private suit was filed promptly and the government failed to intervene. With this conclusion I have no quarrel. *However, Congress specified the remedies it created in a way that excludes an independent action by the United States in this situation. Therefore, I think it is not within judicial competence to grant such a remedy, however desirable that course of action may seem.*”

In construing Section 2651 (b) the Sixth Circuit Court largely echoes the rationale of the *Merrigan* decision relative to the six month provision. The opinion states: “Clause (1) was necessary in order to give the United States an absolute right to intervene, not subject to the discretion

of the trial judge. . . . Clause (2) was required to delay the exercise of the Government's right of action for a reasonable time to give the injured person an opportunity to bring the necessary action if he so desired; and that that was the only limitation on the Government's right to bring an independent action that was intended by Clause (2). Nothing in the legislative history evidenced concern for the tortfeasor or for the possibility that the tortfeasor might be subjected to multiple litigation." (*United States v. York*, C.A. 6, No. 18001, at page 7). Such interpretation substantially alters the plain meaning of the statutory language and amounts to prohibited judicial legislation.

II. The District Court Did Not Err in Refusing to Hold as a Matter of Law on the Present Record That the United States Was Entitled to a Judgment of \$3,275.

The District Court's opinion did not pass upon the question of the availability of the defense of contributory negligence of the parents of the minor child, Carrie Thomas. The Government contends that this defense is not available. Its reasoning, based upon the relevant portion of Section 2651 (a) quoted verbatim on page 16 of appellant's brief, is that the statute creates an independent right of action in the United States. From this premise, the Government asserts that its right to recover is not limited to the third party's right to recover under state law (appellant's brief, page 18). If we understand the Government's contention, it is that no matter how contributorily negligent an injured person might be, the Government would be entitled to collect the reasonable value of the care and services supplied him from a negligent third person, even though the injured party be denied general and other special damages by reason of his own negligence.

We do not concur in this view and find nothing within the Act to support the Government's contention in this regard. In *United States v. Greene*, 266 F.Supp. 976 (U.S.D.C., Ill., 1967) the District Court clearly held that the United States recovery may be barred by substantive defenses such as contributory negligence or lack of negligence.

It is undisputed that in the state court action involving the injuries sustained by the minor child, no claim or contention was made for medical expenses and the parents of the child asserted no claims of their own in that litigation.

It is abundantly clear, under Washington State law, that parents are legally responsible for necessary medical care and expenses rendered their minor children and that minor children may not bring an action to recover such medical expenses without the express consent of the parent. (*Donald v. Ballard*, 34 Wash. 576, 76 Pac. 80). The defense of contributory negligence while not available against a minor child, is available against the parents in their claim for recovery of medical bills. (*Cox v. Hugo*, 52 Wn.2d 815, 324 P.2d 467 (1958)). Similarly, the contributory negligence of a parent of a child of tender years, is imputable to the child in an action by or for the parents. (*McCandless v. Inland N.W. Film Service, Inc.*, 64 Wn.2d 523, 392 P.2d 613 (1964)).

The Government, pursuant to the Act, may have an independent right of action, in that it may bring suit in its own name for the recovery of medical expenses, but such a suit is still derivative in that, as in the instant case, the Government would have had no obligation to pay the expenses of the minor child except and unless the

father of the child was a member of the military service. If the father or the mother of the child were negligent, this negligence should be available to the defense in an action for recovery of the medical expenses.

CONCLUSION

For the foregoing reasons, appellee respectfully submits that the Judgment of the District Court should be affirmed. In the event that the Judgment of the District Court is reversed, this cause should be remanded for trial of the liability issue on the merits with a defense of contributory negligence available to the appellee.

Respectfully submitted,

JOHN A. ROBERTS of
HULLIN, EHRLICHMAN, ROBERTS & HODGE
Attorneys for Appellee

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN A. ROBERTS
of Attorneys for Appellee

No. 22614 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

APPLE VALLEY BUILDING AND DEVELOPMENT CO., INC.,
Appellant,

vs.

BONANZA AIR LINES, INC.,

Appellee.

APPELLANT'S OPENING BRIEF.

BALL, HUNT, HART AND BROWN,
JOSEPH A. BALL,
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FILED

MAY 16 1968

WILLIAM E. LUCK, CLERK

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Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

The jurisdiction of the District Court is based on diversity of citizenship under 28 U.S.C.A. 1332. The action was brought by appellant Apple Valley Building & Development Company, Inc. (hereinafter "Apple Valley") against appellee Bonanza Air Lines, Inc. (hereinafter "Bonanza"). At the time of commencement of the action, Apple Valley was a California corporation with its principal place of business in California.¹ [Clk. Tr. 2.] Bonanza is a Nevada corporation with its principal place of business in Arizona.²

¹Since the commencement of the action, Apple Valley has been merged with Reserve Oil and Gas Company. Reserve is also a California corporation, with its principal place of business in California.

²The complaint alleged that Bonanza's principal place of business was in Nevada. [Clk. Tr. 2.] Bonanza's Answer and
(This footnote is continued on the next page)

[Clk. Tr. 258.] The amount in controversy, exclusive of interest and costs, exceeds \$10,000. [Clk. Tr. 2.]

This appeal is from an order of the District Court granting Bonanza's motion for summary judgment. [Clk. Tr. 266.] The action is to recover rent and other charges due pursuant to a written lease. The amount claimed by Apple Valley is \$41,054.26.³ [Clk. Tr. 119.] The judgment awards only \$7,382.46. [Clk. Tr. 266.] The basis of the decision is that Apple Valley, by its conduct and oral agreement, had waived its right to the further amount claimed. [Clk. Tr. 266.] This court has jurisdiction of the appeal under 28 U.S.C.A. 1291, which authorizes appeals from final decisions of the District Court.

Statement of the Case.

The Terms of the Lease.

This is a suit to recover rent and other charges due under a lease of airport facilities. The lease is in writing and dated July 1, 1957.⁴ [Clk. Tr. 5.] The lease provides that Bonanza will pay Apple Valley three types of rent or other charges:

1. Space rental of \$3.50 per square foot per year, payable monthly, for 1,640 square feet of space leased. This amounts to \$478.33 per month.

Amended Answer denied the jurisdictional allegations, except to admit only that it was incorporated in Nevada. [Clk. Tr. 11, 32.] The findings of fact which Bonanza submitted in connection with its motion for summary judgment stated that its principal place of business was in Phoenix, Arizona. [Clk. Tr. 258.]

³The complaint alleged the total amount due as \$43,054.26. The claim is based on the weight and number of landings of F27 airplanes. After discovery the correct amount was determined to be \$41,054.26. [Clk. Tr. 119.]

⁴The lease was actually executed in November of 1957. [Clk. Tr. 184-186].

2. A minimum landing charge of six cents per thousand pounds per landing of aircraft having a maximum weight of 25,000 pounds. This amounts to \$1.50 per month per landing of aircraft weighing up to 25,000 pounds.

3. An excess weight charge of fifty cents per thousand pounds per landing of aircraft to the extent that they weigh more than 25,000 pounds.

The portion of the lease setting forth these charges is as follows:

“(a) A sum per month calculated and determined on the basis of Three and 50/100 Dollars (\$3.50) per square foot per year for the 1,640 square feet shown on Exhibit ‘A’.

“(b) A sum per month calculated and determined on the basis of six cents (6¢) per thousand pounds of approved landing weight of Bonanza’s aircraft per landing up to an approved maximum landing weight of 25,000 pounds, plus an excess weight charge of fifty cents (50¢) per thousand pounds above 25,000 pounds per landing per month.” [Clk. Tr. 6.]

The Space Rental and Minimum Landing Charge Are Not in Dispute.

There is no dispute about the first two items, space rental and minimum landing charge. The complaint alleged that space rental was due for the period November 30, 1964, through December 31, 1965 [Clk. Tr. 3, par. 6]; and that the minimum landing charge was due for 1,097 landings. [Clk. Tr. 4, par. 8.] In its opposition to the motion for summary judgment, Apple

Valley reduced this portion of its charge to space rental for the period November 30, 1964, through November 30, 1965, which is \$5,739.96. [Clk. Tr. 119, lines 13-17.] The number of landings on which the minimum landing charge was due was reduced to 1,095. [Clk. Tr. 119, lines 24-27.] At \$1.50 per landing, this is \$1,642.50. The total of these items is \$7,382.46, which is the amount of the summary judgment. [Clk. Tr. 266.]

**Apple Valley's Claim for the
Excess Weight Charge.**

The controversy centers around the excess weight charge, for which the court allowed no recovery. The complaint alleged that these charges were due for the period June 1, 1960, through November 30, 1965. [Clk. Tr. 3-4, pars. 7 and 8.] The exact amount due for excess weight charges can be calculated from Bonanza's answers to interrogatories. Therein Bonanza stated that for the period June 1, 1960, through November 30, 1965, there were 1,020 landings of airplanes weighing 36,000 pounds; 1,633 landings of 36,700 pounds; and 2,963 landings of 37,500 pounds. [Clk. Tr. 17-18.] At fifty cents per thousand pounds over 25,000 pounds, this amounts to \$33,681.80.

Bonanza's Answer.

In its Amended Answer, Bonanza alleged that there was a mistake in paragraph 3(b) of the lease, which is the paragraph in question providing for the excess weight charge. Bonanza alleged that the parties orally agreed to a paragraph providing for an excess weight charge identical to that contained in the written lease, except that it provided for a charge of \$.50 per thousand lbs. in excess of 25,000 lbs. *per schedule per month*

instead of per landing. [Clk. Tr. 36-35, Fifth Affirmative Defense.] Under Bonanza's contention, the charge would be due, but in a much lesser amount. If an airline has two scheduled flights per day during the given month, it has only two schedules during that month. But the number of landings in a thirty day month on two schedules would be sixty. Bonanza did not admit, however, that any amount was due, though it admitted in its answers to interrogatories that there had been a substantial number of landings on which the charge would be due under its own interpretation of the agreement. Bonanza alleged in its answer that it had notified Apple Valley of the mistake in Paragraph 3(b) when it discovered the mistake in April of 1960; that Apple Valley failed to assert any rights under Paragraph 3(b); and that Apple Valley thereby waived its right to the excess weight charge completely. [Clk. Tr. 35, par. IV.]

Bonanza's Pre-Trial Statement.

Bonanza's claim of waiver was amplified in its pre-trial statement. Therein, Bonanza said that up to June of 1960 it operated Douglas DC3 aircraft which weighed only 25,000 pounds. As of June 1, 1960, it inaugurated Fairchild F27A service at Apple Valley. These airplanes weighed 36,000 pounds at first; later the weight was increased to 36,700 pounds; and still later to 37,400 pounds.⁵ [Clk. Tr. 49.] The pre-trial statement goes on to say that on April 22, 1960, Bonanza discovered the "mistake or ambiguity" in Para-

⁵The answers to interrogatories stated that the ultimate weight of the F27A was 37,500 pounds. [Clk. Tr. 17-18.] The difference of 100 pounds is de minimus as it amounts to only 5¢ per landing, or a difference of \$148.15 for 2,963 landings.

graph 3(b) of the lease and notified Apple Valley that it was going to use F27A aircraft which would weigh over 25,000 pounds. Bonanza said it told Apple Valley that it interpreted Paragraph 3(b) to mean that the excess weight charge applied only to schedules, and that on a basis of three schedules per day the charge would only be \$16.50 per month for aircraft weighing 36,000 pounds. [Clk. Tr. 40.] Thereafter, Apple Valley billed only for the space rental and minimum landing charge until January of 1965. Bonanza paid only the space rental and minimum landing charge. Since Apple Valley did not bill for any excess weight charge before January of 1965, Bonanza argued that the claim was waived entirely. [Clk. Tr. 40-43.]

The Motion for Summary Judgment.

Thereafter Bonanza moved for summary judgment, and the court granted the motion on the theory that Apple Valley had by its conduct and by its oral agreement waived all rights to any excess weight charge. [Clk. Tr. 266.] Thus, the court denied recovery of even the per schedule charge which would be due under even Bonanza's interpretation of the contract. The evidence does not support the finding that Apple Valley waived its right to the excess weight charge, and in any event there is clearly a conflict in the evidence. The facts developed through discovery and shown in the affidavits filed in connection with the motion for summary judgment are as follows:

**The Claim of Mistake or Ambiguity—
Mrs. Murphy's Deposition.**

There is no mistake or ambiguity in the lease. The lease was executed on behalf of Bonanza by its vice

president and secretary Florence J. Murphy. [Clk. Tr. 10.] Prior to execution of the lease she prepared a proposed draft which she sent to Apple Valley on May 1, 1957. The draft provided for excess weight charges on a *per schedule* basis [Clk. Tr. 160.], and she pointed out in her letter of transmittal that this was the basis for the excess weight charge that she proposed. [Clk. Tr. 166.] Mrs. Murphy also prepared the lease that was later executed as of July, 1, 1957, and which contains the clause (Par. 3(b)) providing for the excess weight charge on a *per landing* basis. It was typed by her secretary [Clk. Tr. 126, lines 13-19.] In her deposition, Paragraph 3(b) was read to Mrs. Murphy. [Clk. Tr. 126.] She said that this accurately reflects the agreement between Apple Valley and Bonanza. [Clk. Tr. 127, lines 7-12.] She said that Newt Bass, who negotiated the lease on behalf of Apple Valley insisted that the excess weight charge be on a *per landing* basis instead of a *per schedule* basis. [Clk. Tr. 127, lines 13-24.] Mrs. Murphy said she was concerned over this because it would result in additional charges to Bonanza, and she was sure that she discussed it with Mr. Converse, the President of Bonanza. [Clk. Tr. 127, line 125, to 128, line 11.] Mr. Converse told her not to be too concerned because he did not think the F27 would ever be used at Apple Valley. [Clk. Tr. 130, line 24, to 131, line 12.] Later, Mrs. Murphy testified again that she knew that the lease she prepared and executed provided for the excess weight charge on a *per landing* basis, that she was concerned about it, that she discussed it with Mr. Converse, and that he said not to worry about it. [Clk. Tr. 136.]

Bonanza's Claim of Waiver.

There was no waiver of the excess weight charge. In view of the testimony of Mrs. Murphy that she negotiated and executed the lease for Bonanza and clearly understood that the excess weight charge was to be on a per landing basis, it is difficult to see how Bonanza could argue to the contrary. Yet that is the position that Bonanza continued to take in its motion for summary judgment. In its motion for summary judgment Bonanza offered no evidence to contradict Mrs. Murphy. Instead it merely asserted that it construed Paragraph 3(b) of the lease to mean that the excess weight charge was to be on a per schedule basis. Bonanza also asserted that on April 22, 1960, it orally notified Apple Valley that it intended to institute F27A service, that it interpreted the excess weight charge to be on a per schedule basis, and that Apple Valley did not bill for any excess weight charges until January of 1965. One additional allegation was added to the claim that Apple Valley had waived its right to any excess weight charge. Bonanza's memorandum of points and authorities in support of the motion for summary judgment says that at a meeting on April 22, 1960, the Apple Valley officials agreed with Bonanza's interpretation of Paragraph 3(b) and stated that Bonanza would be advised if Apple Valley took a different view after further consideration. [Clk. Tr. 63, lines 23-27.] This alleged "tentative" agreement is not supported by the Bonanza affidavits, and is in sharp conflict with the Apple Valley affidavits.

The Bonanza Affidavits.

The Bonanza affidavits which are supposed to prove the agreement to accept Bonanza's interpretation are the affidavits of Louis Arpin and Arthur Taylor. [Clk. Tr. 63, lines 26-27.] Arpin said he was present at a meeting representing Bonanza, but he could not say positively that there was any agreement. He said that "to the best of my recollection, the representatives of Apple Valley concurred or appeared to concur in our interpretation of Article III-B." [Clk. Tr. 92, lines 9-11.] Taylor was not present at the meeting. His affidavit was made for the purpose of showing some hand written notes made by Ralston O. Hawkins. Hawkins was the other Bonanza representative and is now deceased. Hawkins' notes show positively that there was no agreement. The notes say this:

"We told them of our interpretation of the excess weight charge. They had no disagreement but I am not sure they bought it.

"Newt Bass will take up the matter with Bd of Directors on Monday April 25 - We are supposed to get an answer shortly thereafter -"
[Clk. Tr. 94.]

Hawkins' notes go on to say that:

"Under *our* interpretation of the excess weight proposition of the contract *our* landing fees at Apple Valley will be \$5.04 per day x 30 = \$151.20 monthly approx." [Clk. Tr. 94.]

"Our interpretation" means Bonanza's interpretation. For the period June 1, 1960 through November 30, 1965, this would amount to \$9,979.20, and would actually be somewhat higher, as the weight of the F27

was increased from 36,000 pounds to 36,700 pounds in 1961, and to 37,500 pounds in 1963. [Clk. Tr. 18.] In other words, even if we disregard Mrs. Murphy's testimony and accept Bonanza's interpretation of the lease, and even if we accept Bonanza's contention that there was an agreement, it was not an agreement to waive all excess weight charges. The agreement, if there was one, was to accept a lesser weight charge which would be at least \$9,979.20. Yet the court held that Apple Valley, by its conduct and oral agreement, had waived the right to any excess weight charge.

The Apple Valley Affidavits.

The Apple Valley affidavits show that there was no agreement and no waiver. According to Arpin, the Apple Valley representatives at the alleged April 22, 1960, meeting were William Barris and William Sawyer. [Clk. Tr. 91, lines 19-20.] Sawyer's affidavit shows that he has no recollection of any meeting on April 22, 1960, with Hawkins, Arpin, Barris or anyone else; and that he never discussed the excess weight landing fee provision with Bonanza representatives at any time. [Clk. Tr. 223.] Barris' affidavit shows that he also has no recollection of any meeting on April 22, 1960, and Barris says that he had nothing whatever to do with lease negotiations prior to January 26, 1965. [Clk. Tr. 213, lines 17-23.] Barris added, however, that he did have a meeting on January 26, 1965, with Arthur Taylor and Earl Hall who is another Bonanza representative. [Clk. Tr. 213, lines 23-25.] At this meeting Bonanza acknowledged its obligation for the excess weight charge. Barris says:

“The subject of excess weight charges as provided by the terms of the written lease was dis-

cussed. Taylor and Hall agreed that Bonanza owed money to Apple Valley Building and Development Co. and agreed that Bonanza would furnish to Apple Valley Building and Development Co. a statement according to their interpretation of the wording used; that there was a misunderstanding in their accounting department and that it would be taken care of. They stated that the wording of the lease had been misinterpreted and that this was an issue that would have to be settled. I repeated that the position of Apple Valley Building and Development Co. was as stated in the billing of January 19, 1965." [Clk. Tr. 214, lines 18-29.]

Barris also made a written memorandum of this meeting with Hall and Taylor, which shows that on January 26, 1965, Hall and Taylor agreed that Bonanza owed Apple Valley for the excess weight charge. Barris' affidavit and this memorandum show also that there was no prior agreement to waive the charge. [Clk. Tr. 217.]

The Failure to Bill for the Excess Weight Charge Was Explained.

The evidence shows why Apple Valley did not bill for the excess weight charge prior to January of 1965. It did not know the weight of the F27A, and hence did not know that the charge had become applicable. Up until June of 1960 Bonanza used DC3s. The DC3 weighs only 25,000 pounds. At the time the lease was made it was not contemplated that any other type of airplane would be used, and so the excess weight charge

was a moot question. Apple Valley, of course, knew that Bonanza began using the F27A in June of 1960. But there is a substantial question of whether Apple Valley knew the weight of the F27A. In all correspondence during the relevant period the weight of the F27A is not mentioned, and significantly there is also no mention of any oral agreement of April 22, 1960, or of the excess weight charge provision.

The affidavit of Walter E. Cramer, Jr. [Clk. Tr. 219], shows that Apple Valley was not advised of the weight of the F27 until February of 1964. Cramer was, prior to the merger with Reserve Oil and Gas Co., the Assistant Secretary and later the Secretary-Treasurer and a Vice-President of Apple Valley. He was the person who was in charge of such things as this. Cramer examined all of the books and records of Apple Valley and determined that there was nothing to indicate that any meeting was held with Bonanza on April 22, 1960, or any discussion of any kind in connection with the excess weight charge provision. If anything of that nature had occurred, it would have been referred to Apple Valley's legal counsel. [Clk. Tr. 219, line 16, to 220, line 8.] Cramer did not know what the F27 weighed. [Clk. Tr. 220, lines 17-23.] In preparation for a meeting in February of 1964 to renegotiate the lease, he reviewed the lease and noted the excess weight charge provision. At the meeting he asked the Bonanza representatives what the F27 weighed. They said it was then 37,500 pounds. Cramer said that that would mean

that Bonanza owed Apple Valley an additional charge for the F27 operation. The Bonanza officials did not deny this, and they did not claim there had been a waiver of the charge. They did not even at that time assert their per schedule interpretation of the lease. Cramer says that Myron Reynolds, one of the Bonanza representatives, "admitted he found the excess weight provision in the lease and meant to say something about it, but it had slipped his mind." [Clk. Tr. 220, lines 10-12.]

This is the evidence on which the court granted a motion for summary judgment. The evidence showed positively and without contradiction that there was no mistake or ambiguity about the per landing basis for the excess weight charge. (Deposition of Florence Murphy.) There could be no waiver by failure to bill, as there is no evidence (except for the alleged meeting of April 22, 1960, which is disputed) that Apple Valley was ever notified of the weight of the F27A, or that it was otherwise notified that the charge had become applicable, until February of 1964. The evidence on the alleged oral agreement was conflicting. Apple Valley claimed there was no agreement. (Affidavits of Cramer, Barris and Sawyer.) Bonanza claimed an agreement to accept a lesser charge, which would amount to some \$10,-000. (Hawkins' notes.) Even under Bonanza's view of the evidence, Apple Valley is entitled to this amount. On motion for summary judgment Bonanza's version cannot be the basis of judgment because of the disputed facts; but the court went further and held that Apple Valley, by its conduct and oral agreement, had waived the charge completely.

SUMMARY OF ARGUMENT
AND
SPECIFICATION OF ERRORS.

1. The court erred in granting a motion for summary judgment because there were conflicts in the evidence on each of the material issues on which the judgment was granted.

2. The court erred in denying recovery of any excess weight charge because Bonanza's evidence showed that it had agreed to pay at least a per schedule excess weight charge.

3. The affidavits submitted in support of the motion for summary judgment were insufficient as a matter of law.

I.

The Court Erred in Granting a Motion for Summary Judgment Because There Were Conflicts in the Evidence on Each of the Material Issues on Which the Judgment Was Granted.

The law is settled in this circuit and elsewhere that summary judgment is not a fact finding procedure. The sole question to be determined is whether there are any genuine issues of material fact. If the facts upon which the judgment can be predicated are conceded or at least undisputed by evidentiary showing, the motion may be granted. But if there is any conflict in the evidence summary judgment must be denied. The only procedure authorized for weighing and determining conflicting evidence is a trial. (*Sartor v. Arkansas Natural Gas Corp.* (1944), 321 U.S. 620, 627, 628-629 [88 L. Ed. 967, 64 S. Ct. 724]; *Consolidated Electric Co. v. U. S. Ex rel. Gough Industries Inc.* (9th

cir. 1966), 355 F. 2d 437, 438; *United States v. Diebold Inc.* (1962), 369 U.S. 654, 655 [8 L. Ed. 2d 176, 82 S. Ct. 993]; *Stevens v. Howard D. Johnson* (4th cir. 1950), 181 F. 2d 390, 394; *Walling v. Fairmount Creamery Co.* (8th cir. 1943), 139 F. 2d 318, 322; *Union Insurance Society v. William Glucken and Co.* (2d cir. 1965), 353 F. 2d 946, 951; *Taylor v. Black, Sivalls and Bryson* (8th cir. 1951), 189 F. 2d 213 216.)

Tested by these principals, the summary judgment in this case was clearly unwarranted. The court held that Apple Valley, by its conduct and oral agreement, had waived its right to any excess weight charge. There was a substantial conflict in the evidence on each of these points.⁶

Modification by Oral Agreement.

Insofar as a conflict in the evidence is concerned, the oral agreement need hardly be mentioned. Bonanza relies on an oral agreement at a meeting on April 22, 1960. [Clk. Tr. 91-94.] Putting aside the question of whether Bonanza's evidence shows that any agreement was reached, there is a clear conflict in the evidence as to whether this meeting occurred at all. Apple Valley contends that there was no such meeting, and that there was no discussion at any time of the subject matter Bonanza claims was discussed at the alleged meeting. The Apple Valley representatives who were supposed to have been at this meeting are Barris and Sawyer. Neither has any recollection of such a meeting. Barris

⁶In this portion of the brief we assume for sake of argument that Bonanza's affidavits, if uncontradicted, would support the judgment. This is not conceded and later in this brief we will show that the judgment is improper even if the evidence were construed most favorably to Bonanza.

says he had nothing to do with lease negotiations until January of 1965. Sawyer has never discussed the excess weight charge provision with any Bonanza representative. [Clk. Tr. 213-223.]

Waiver by Conduct.

Waiver is the voluntary relinquishment of a known right. (*Hacker etc. v. Chapman* (1963), 17 Cal. App. 2d 265, 275 [61 P. 2d 944]; *Wienke v. Smith* (1918), 179 Cal. 220, 226 [176 Pac. 42]; *Roesch v. De Mota* (1944), 24 Cal. 2d 563, 572 [150 P. 2d 422]; *Strauss v. Owens* (1957), 148 Cal. App. 2d 570, 574 [307 P. 2d 81]; *Banducci v. Frank T. Hickey Inc.* (1949), 93 Cal. App. 2d 658, 662 [209 P. 2d 398].)

Under certain circumstances a person's conduct in failing to assert a claim may amount to a waiver. But in any such case it is essential to show that the person against whom the waiver is asserted knew the facts giving rise to the right and that he intended to waive the right.

Bonanza relies on the fact that Apple Valley did not bill for the excess weight charge until January of 1965. For present purposes we may assume that such conduct might amount to a waiver. But there is no proof, but for the alleged meeting of April 22, 1960, that Apple Valley was ever notified prior to February of 1964 that the excess weight charge was applicable. Up until June of 1960 Bonanza used DC3's. These airplanes weighed only 25,000 pounds. The operative fact is the weight of the F27A. Apple Valley could not be expected to bill for the excess weight charge unless it knew that the weight of the F27A was in excess of 25,000 pounds. There is no evidence except the claimed meeting of April

22, 1960, which is denied, that Apple Valley was ever notified of this fact prior to February of 1964. The affidavit of Cramer shows positively that Apple Valley did not know the weight of the F27A until it was told by Bonanza at the meeting of February, 1964. He immediately asserted Apple Valley's claim and Bonanza admitted its obligation. [Clk. Tr. 220-221.] This is not evidence of waiver. It shows there was no waiver.

II.

The Court Erred in Denying Recovery of Any Excess Weight Charge Because Bonanza's Evidence Showed That It Had Agreed to Pay at Least a Per Schedule Excess Weight Charge.

Probably the most astounding thing about the summary judgment is the way in which the court construed Bonanza's evidence of the oral agreement on April 22, 1960. In order to find a waiver by conduct the court had to find, as it did [Clk. Tr. 260], that there was a meeting on April 22, 1960. In doing so, the court had to disbelieve Barris' and Sawyer's testimony that there was no such meeting. The Court had no right to weigh the evidence and resolve their conflict. Bonanza's evidence that there was such a meeting is the only evidence to show that Apple Valley knew the F27A weighed more than 25,000 pounds, and hence should claim the excess weight charge. Without such knowledge there could be no waiver.

The problem is not only in finding that there was a meeting when the evidence was disputed as to whether there was a meeting at all. Once the court accepted Bonanza's version it should have at least found in accordance with Bonanza's evidence. That evidence does

not show a complete waiver of the excess weight charge by any stretch of the imagination. Bonanza says that what they hoped to obtain an agreement on was a lesser excess weight charge based on schedules instead of landings. Hawkins' notes show that Bonanza had specifically calculated its obligation under its interpretation to be approximately \$151.20 per month. This would amount to at least \$9,979.20 for the relevant period.

This evidence does not show a waiver of the excess weight charge. At most it shows only a waiver of the charge on a per landing basis, and an agreement by Bonanza to pay the charge per schedule. Apple Valley is at least entitled to the benefit of Bonanza's evidence which admits that over \$9,000.00 is due for excess weight charges. [See: Hawkins' notes, Clk. Tr. 94.]

III.

The Affidavits Submitted in Support of the Motion for Summary Judgment Were Insufficient as a Matter of Law.

Summary Judgment is improper, not only when there is a conflict in the evidence, but also when the moving party's affidavits are not sufficient to support the judgment as a matter of law. (*Sartor v. Arkansas Natural Gas Corp.* (1944), 321 U.S. 620, 627 [88 L. Ed. 967, 64 S. Ct. 726].) Bonanza's affidavits are insufficient to support the judgment without regard to the opposing affidavits of Apple Valley.

There was no oral agreement to waive any part of the excess weight charge. The most Bonanza's affidavits show is that there was a discussion of the problem on April 22, 1960. Neither Arpin's affidavit nor

Hawkins' notes state unequivocally that there was any agreement. Arpin says that to the best of his recollection the Apple Valley representatives "concurred or appeared to concur" and stated that "Bonanza would be advised if they did not concur." [Clk. Tr. 92.] Hawkins' notes are equally uncertain as to whether there was any agreement. The notes say "I'm not sure they bought it." Newt Bass was to take it up with the Board of Directors and "we are supposed to get an answer shortly thereafter". [Clk. Tr. 92.] This is not evidence of an agreement. It shows only a discussion of the problem.

The proposition that Apple Valley waived the excess weight charge by failure to bill for it is even more questionable. In the first place, the lease says nothing about bills. The lease says only that Bonanza will pay the rent and other charges. [Clk. Tr. 5.] The affidavit of Thomas J. Van Bogart, the Bonanza comptroller, says that it is Bonanza's (not Apple Valley's) practice to provide a monthly activity report to the airport operator so that the airport can send a bill. [Clk. Tr. 97.] Attached to Van Bogart's affidavit are some of the activity reports sent to Apple Valley. [Clk. Tr. 101-111.] These do not show the weight of the airplanes or the number of schedules. They show only number of landings of F27A aircraft.

Bonanza claims that at the alleged meeting of April 22, 1960, Apple Valley either agreed or said that it might agree to reduce the excess weight charge to a per schedule charge instead of a per landing charge. This is not proof of waiver of all excess weight landing charges. The proposition of waiving the charge was never even considered. Immediately following the meet-

ing, Apple Valley did not bill for any excess weight charge at all. Can you infer from that that Apple Valley decided not only to agree to Bonanza's per schedule proposal, but also to give up the charge completely? Why should Apple Valley do that? This is an incredible assumption, and yet that is exactly what Bonanza's claim of waiver amounts to. Bonanza claims a waiver of all excess weight landing charges. Yet this is more than Bonanza ever asked for.

If we add the fact that Bonanza gave Apple Valley monthly activity reports and expected Apple Valley to bill based on those reports, it is even more difficult to infer a waiver. Bonanza came away from the meeting either thinking that it had an agreement for a per schedule charge or hoping to get one. But its activity reports showed landings, not schedules. This might be construed to mean that Bonanza thought Apple Valley did not agree to a per schedule charge, and so reported landings. This also raises an inference that there was no meeting at all. If Bonanza thought it had or hoped to have a per schedule agreement, it would have reported schedules. There is still a third way to construe this evidence. Paragraph 3(b) of the lease provides that the minimum charge up to 25,000 pounds is on a landing basis. There is no dispute about that. The only question is whether the excess weight charge is calculated on the same basis or on a schedule basis. At the meeting the parties did not solve the problem. Therefore, Bonanza gave Apple Valley activity reports

showing only landings, expecting to be billed for only the minimum charge, and to later pay the excess weight charge when the dispute was settled as to how this charge would be calculated.

There are probably more ways to interpret Bonanza's evidence. The point is that there is an inference that Apple Valley did not intend to waive the excess weight charge by not billing for it. This appears from Bonanza's affidavits alone, without regard to the conflicts raised by Apple Valley's affidavits. Bonanza's affidavits are not sufficient to support its motion for summary judgment.

Conclusion.

It was error to grant a summary judgment in this case. The affidavits show, without question, that there are material issues of fact to be tried. There is a sharp conflict as to whether there was any meeting on April 22, 1960 as claimed by Bonanza, or any other discussion of waiver of the excess weight charge. If Bonanza's contention is accepted that there was a meeting, its evidence shows that there was no agreement to waive the charge completely, but only to reduce it to a lesser amount. Apple Valley is at least entitled to a lesser amount. Bonanza's affidavits are also insufficient in and of themselves to support the summary judgment. The affidavits regarding the meeting do not show that any agreement was reached. The inference that Apple Valley intended to waive the excess

weight charge simply because it did not bill for it is tenuous at best. It is more logical, or at least just as logical, to infer that there was no intent to waive the charge. The judgment should be reversed, and the case remanded so that there can be a trial of these issues of fact.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH D. MULLENDER, JR.

NO. 22614

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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DEVELOPMENT CO., INC.

Appellant,

vs.

BONANZA AIR LINES, INC.,

Appellee.

APPELLEE'S BRIEF

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THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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NO. 22614
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPLE VALLEY BUILDING AND
DEVELOPMENT CO., INC.

Appellant,

vs.

BONANZA AIR LINES, INC.,

Appellee.

APPELLEE'S BRIEF

STATEMENT OF JURISDICTION

The jurisdiction of the District Court is based upon diversity of citizenship under Title 28 U.S.C. § 1332. Plaintiff and appellant, Apple Valley Building and Development Co., Inc. (hereinafter called "Apple Valley Co."), was a California corporation, since merged in The Reserve Oil and Gas Company, also a California corporation (Tr. 2; Appellant's Brief, p. 1). The principal place of business of both corporations was and is California (Tr. 2; Appellant's Brief, p. 1). Defendant and appellee, Bonanza Air Lines, Inc., (hereinafter called "Bonanza"), is a Nevada corporation with its principal place of business in Arizona (Tr. 32; 258). The amount in controversy, exclusive of interests and costs, exceeds \$10,000 (Tr. 2).

The District Court granted Bonanza's Motion for Summary Judgment and Apple Valley Co. appeals (Tr. 266, 280). Apple Valley Co. sued to recover rent, ordinary landing fees and excess weight landing fees alleged due under the terms of a written contract for the period June 1, 1960, to November 30, 1965 (Tr. 2). Suit was instituted in February 1966 (Tr. 2). Bonanza conceded the amounts of space rental and ordinary landing fees due and paid into the Registry of the District Court the amount of \$7,382.46 so that the only amount which remained in controversy is that related to excess weight landing fees (Tr. 224, 230). As to these fees, the District Court held that Apple Valley Co. waived excess landing weight fee provisions of the lease during the term of the lease and during the hold-over period by the agreement reached on April 22, 1960, and by its conduct thereafter (Tr. 263-4). This Court has jurisdiction of this appeal under Title 28 U.S.C. 1291.

STATEMENT OF THE CASE

Because the Statement of the Case made by appellant contains a recitation of facts and argument, much of which is not material or pertinent to the basis of the order granting summary judgment of the Court below, and which fails to refer at all to the Findings of Fact and Conclusions of Law entered herein, appellee submits a separate statement of the case in the following paragraphs, taken primarily from the findings of fact made by the Trial Court (Tr. 258 et seq.).

Appellant has instituted suit against appellee for rent and landing fees, including excess weight landing charges allegedly due the appellant under the terms of a written lease which was for the period July 1, 1957, to July 1, 1962, and for the subsequent period July 1, 1962, to November 30, 1965, during which period appellee was in occupancy of the same premises without written commitment (Tr. 2). It is alleged by the appellant that excess weight landing charges are due and unpaid for the period June 1, 1960, to November 30, 1965, and that space rental and basic landing fees are due for the period December 1, 1964, to and including November 30, 1965 (Tr. 3).

Appellee, by its Amended Answer, has denied liability, (Tr. 32 et seq.) except that, by its reply to the Opposition to the Motion for Summary Judgment, it has conceded space rental and basic landing fees to be due the appellant for the period December 1, 1964, to and including November 30, 1965, in the amount of \$7,382.46 (Tr. 224, 230-1). Appellee has also, by its Amended Complaint, set up the Affirmative Defenses of Waiver and Estoppel, and the bars of the statutes of limitation for certain periods (Tr. 33-6).

Appellant, Apple Valley Co., during the period in question, owned and operated an airport at Apple Valley, California (Tr. 2). Appellant, subsequent to the institution of this action, became merged with The Reserve Oil and Gas Company (Appellant's Brief, p. 1).

Appellee, Bonanza, is an operating public carrier

serving many points in the Pacific Southwest area (Tr. 61).

During the year 1957, Apple Valley Co. and Bonanza entered into a lease which provided for airport space rental and landing fees and excess weight landing fees, to be paid by the appellee to the appellant. The lease was for a period of five years and expired on July 1, 1962. The lease contained no option or other provision for renewal (Tr. 5).

Appellee, Bonanza, initiated air service between Los Angeles, Apple Valley and Las Vegas, Nevada, in 1957, utilizing aircraft known as DC-3's, which had a certified gross landing weight of 25,000 pounds (Tr. 39, 48).

On April 22, 1960, a meeting was held at the facilities of Apple Valley Co. at Apple Valley, California, between Ralston O. Hawkins, General Counsel of Bonanza, Louis J. Arpin, Assistant to Vice President - Operations, of Bonanza, and William Barris, Airport Manager for Apple Valley Co. and William Sawyer, Vice President of Apple Valley Co. (Tr. 91, 94).

At said meeting the parties discussed the proposed initiation of service to the Apple Valley Airport by Bonanza of F-27A aircraft in place of DC-3 aircraft, on or about June 1, 1960. The representatives of Apple Valley Co. were advised of these plans and that the F-27A had a gross weight of 36,000 pounds (Tr. 91-2).

There also was discussed at that meeting the interpretation and application of Article 3(b) of the aforesaid lease and the representatives of Apple Valley were advised by

the Bonanza representatives that said Article 3(b), providing for excess landing weights, should properly be interpreted and applied according to Bonanza's view of its meaning, which was fifty cents per one thousand pounds of weight in excess of the standard DC-3 weight of 25,000 pounds, times the number of schedules in effect during the billing month, and that the Bonanza representatives would recommend to Bonanza management that the service to Apple Valley be terminated or curtailed if any additional amount of excess landing weight fees were to be demanded by Apple Valley (Tr. 92).

At said meeting, the representatives of Apple Valley Co. concurred, or appeared to concur, in the interpretation of Article 3(b) of the lease by the Bonanza representatives. The Apple Valley Co. representatives did not protest the proposal, nor did they advise that Bonanza would be billed at any other rate. They stated that Bonanza would be advised if they did not concur (Tr. 92).

The proposed F-27A service was initiated at Apple Valley Airport by Bonanza on or about June 1, 1960 (Tr. 39).

From April 22, 1960, until July 1, 1962, the date on which the lease expired, no communication by either party was made to the other concerning the application of the excess weight charge provision, 3(b), of said lease, in the landing of F-27A aircraft (Tr. 92, 97-8).

After June 1, 1960, to July 1, 1962, although Bonanza had no duty by contract or otherwise to do so, Bonanza monthly

advised Apple Valley Co. of the number of landings its aircraft had made during the preceding month, and the type of aircraft which had made the landings, to-wit, F-27A's; and, following receipt of this information, in each of said months, Apple Valley Co. billed Bonanza for space rental and for landing fees at the rate of \$1.50 per landing and made no charge for excess weight landing fees whatsoever. That thereafter, and until July 1, 1962, Bonanza paid said statements rendered to it by Apple Valley Co. (Tr. 97-98).

After the expiration of said lease on July 1, 1962, Bonanza continued to submit the same information to Apple Valley Co. and Apple Valley Co. continued to bill in the same manner as heretofore described (Tr. 98).

On December 27, 1963, Arthur M. Taylor, General Counsel for Bonanza, wrote a letter to Walter Cramer, Secretary-Treasurer of Apple Valley Co. stating in part as follows:

"As you may know, I have written several letters requesting that someone from the Apple Valley Development Corporation and Bonanza Air Lines confer with regard to this company's future operations. Also, as you know, our lease has expired, and we are presently operating on a month-to-month basis predicated by the rates and charges set in the old lease" (Tr. 80, 88).

After receipt by Apple Valley Co. of the letter referred to above, Bonanza continued to submit the same billing information as heretofore set out and Apple Valley Co. continued to

bill Bonanza for space rental and the fee of \$1.50 per landing, without any charge for excess weight landing fees, which statements were fully paid by Bonanza for the months of December 1963 and January 1964 (Tr. 98).

On February 6, 1964, a meeting was held between Myron Reynolds, Arthur Taylor and Bernie Novia of Bonanza, and Walter E. Cramer, Vice President of Apple Valley Co., at the office of Mr. Cramer. At said meeting Mr. Cramer, on behalf of Apple Valley Co. alleged that Apple Valley Co. was entitled to excess weight fees under the provisions of the original lease (Tr. 81).

After the meeting of February 6, 1964, Bonanza furnished the usual billing information to Apple Valley Co. as aforesaid, and Apple Valley Co. made a statement to Bonanza for space rental and landing fees at the rate of \$1.50 per landing and made no charge for excess weight fees, which statement was paid by Bonanza (Tr. 98).

Apple Valley Co. did not render any statement or billing to Bonanza for the period March 1964, to October 1964, inclusive. The amounts due for these months for space rental and landing fees at the rate of \$1.50 per landing were computed by Bonanza, and on December 11, 1964, Bonanza forwarded payment in the amount of \$4,924.64 to Apple Valley Co., which check was accepted by Apple Valley Co. (Tr. 98).

Thereafter on December 21, 1964, Apple Valley Co. sent a written statement to Bonanza for the month of November

1964, for building rental of \$478.33, and landing fees of \$1.50 per landing made during said month and no more. This statement did not include any amount for excess weight landing fees. This statement was paid by Bonanza and Bonanza's check in payment thereof was accepted by Apple Valley Co. (Tr. 98).

Under date of January 18, 1965, Apple Valley Co. sent a written statement to Bonanza for the month of December 1964, for rent in the amount of \$478.33, landing fees of \$1.50 per landing for one hundred landings, and for excess weight landing fees in the amount of \$625.00. This was the first time any statement or demand was made for excess weight landing fees. Shortly thereafter, Bonanza forwarded to Apple Valley Co. a check for space rental and landing fees at the rate of \$1.50 per landing, but no more. Apple Valley Co. returned said check to Bonanza and thereafter made no further written statement or demand to Bonanza for space rental, landing fees or excess landing fees for the months of January 1965 to and including November 1965 (Tr. 99).

Bonanza vacated the Apple Valley Airport and made no further landings at that airport after November 30, 1965 (Tr. 99).

The records of Apple Valley Co. record rentals and other receivables in the nature of income as cash items and show the same as income when received; at the end of each of Apple Valley Co.'s fiscal year on its books, rental receivables are accrued and placed in income; but the records of Apple Valley Co. do not reflect any rents receivable, landing fees

receivable, or excess weight landing fees receivable due from Bonanza for any period whatsoever (Tr. 99-100).

SUMMARY OF ARGUMENT AND RESTATEMENT
OF SPECIFICATION OF ERRORS.

Appellant's brief argues basically that there was a controverted question of fact concerning the meeting of April 22, 1960. He argues first that it did not occur and that his affidavits controvert its occurrence, and second, that if it did occur, the things done and said at that meeting did not constitute an agreement between the parties.

Appellee's position is simply that first, appellant failed to controvert either the fact of the meeting or the understanding reached at that meeting, and second, that the things done and said at the meeting of April 22, 1960, coupled with the conduct of appellant from and after that time, constituted a waiver of excess weight charges alleged to be due under Paragraph 3(b) of the lease while it was in effect and during the subsequent period.

ARGUMENT

I

THE EVIDENCE SUBMITTED TO THE TRIAL COURT BY APPELLANT DOES NOT CONTROVERT IN ANY WAY APPELLEE'S EVIDENCE RELATING TO THE MEETING OF APRIL 22, 1960.

Throughout the argument in appellant's brief, in both the sections of the brief entitled "Statement of the Case" and that entitled "Argument," appellant constantly contends that the affidavits submitted by Louis Arpin and Arthur Taylor relative to the conference between the parties on April 22, 1960, (Tr. 91, 93) are controverted by the affidavits of William Barris, William Sawyer and Walter E. Cramer presented by the appellant (Tr. 213, 217, 223).

Mr. Taylor's affidavit presents a memorandum from the files of Bonanza in the handwriting of Ralston Hawkins, now deceased, who was General Counsel for Bonanza in the year 1960. This memorandum relates some of the conversation which occurred at the meeting of April 22, 1960 (Tr. 93, 94).

Another person present at the meeting was Louis J. Arpin. His affidavit relates what occurred at the meeting and reads in part as follows:

"That on April 22, 1960, I was present at a conference at the facilities of the Apple Valley Building and Development Co., Inc., hereinafter called "Apple Valley," in Apple Valley, California,

at which conference also present were Ralston O. Hawkins, Bonanza's General Counsel, William Barris, Apple Valley Airport Manager, and another representative of Apple Valley, whom I believe to have been a Mr. Sawyer.

"That the purpose of the aforementioned conference was to discuss the initiation of F-27A operation in place of DC-3 aircraft. The F-27A at that time, had gross weight of 36,000 pounds. The representatives of Apple Valley were advised of these facts and that it was planned to start the service to the Apple Valley Airport on June 1, 1960. That in connection therewith there was discussed the interpretation and application of Article III-B of Bonanza's operations lease with the representatives of Apple Valley. The representatives of Apple Valley were advised that said Article III-B, providing for excess landing weights, should properly be interpreted and applied according to Bonanza's view of its meaning, which was 50¢ per 1,000 pounds of weight in excess of the standard DC-3 weight of 25,000 pounds times the number of schedules in effect during the billing month, and to further advise the representatives of Apple Valley that we would recommend to Bonanza management that the service to Apple Valley be terminated or curtailed if any additional amount of excess landing weight fees were to be demanded.

"That to the best of my recollection, the representatives of Apple Valley concurred or appeared to concur in our interpretation of Article III-B. They did not protest our proposal, nor did they advise that Bonanza would be billed at any other rate; that they stated that Bonanza would be advised if they did not concur; that thereafter and until the 31st day of October, 1963, when I ceased to be associated with Bonanza in my capacity as Assistant to Vice President - Operations, I heard nothing whatsoever further from representatives of Apple Valley with respect to the application of any excess weight landing rates and charges of any kind." (Underscoring supplied) (Tr. 91, 92).

Appellant urges that the affidavits of William Barris and William Sawyer controvert the affidavits of Arthur Taylor and Louis Arpin. They do not. Neither affidavit denies that the meeting took place. Instead they aver that Barris and Sawyer have no recollection of the meeting in the following words:

(From the affidavit of William Barris) "I have personally examined all the records of Apple Valley Building and Development Company with respect to the lease and use of Apple Valley Airport by Bonanza Air Lines. There is no record, nor do I have any recollection of having attended any meeting on April 22, 1960, in the company of Ralston Hawkins, Louis Arpin, William Sawyer, nor anyone else." (Emphasis supplied) (Tr. 217).

(Mr. Sawyer's affidavit) "I have no recollection of
having attended any meeting on April 22, 1960, in the company
of Ralston Hawkins, Louis Arpin, William Barris, nor anyone
else." (Emphasis supplied) (Tr. 223).

When an event is established by competent evidence,
the failure of witnesses on the other side to recollect the event
is entitled to no weight and cannot raise an issue of fact.

Reid v. Holcomb, 63 Cal. App. 89,

218 Pac. 76 (1923)

Griffith v. San Diego College of Women,

___ Cal. App. 2d ___, 280 P. 2d 203 (1955)

Port of Palm District v. Goethals, (C. C. A. 5, 1939)

104 F. 2d 706, 709-710

Idaho Merc. Co. v. Kalanquin, 8 Idaho 101,

66 Pac. 933

Herman Lumber Company v. Bjurstron,

74 Misc. Rep. 93, 131 N. Y. S. 689

Inman's Administratrix v. United States Rys. Co.

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Railsback v. Patten, 34 Neb. 490,

52 N. W. 277

Corpus Juris, Vol. 23, p. 42

Corpus Juris, Vol. 32-A (Evidence) p. 724.

Without a denial that the meeting took place and without a denial of the facts stated in Mr. Louis Arpin's affidavit, appellant has no standing before this Court to argue that an issue of fact exists either as to the meeting or what therein transpired.

As must be evident, many of appellant's conclusions, based upon the alleged controversion of the evidence relating to the meeting of April 22, 1960, must fall. This would include the assertion that Apple Valley Co. was unaware of the weight of the F-27A until February of 1964, for at the meeting of April 22, 1960, duly authorized representatives of Apple Valley Co. were specifically made aware of the heavier weight of the F-27A and the excess weight clause in the lease (Tr. 91). The whole course of action of Apple Valley Co. from that date forward must, and has to be, considered in the light of this meeting. The company was happy to have the service and so far as billing for the excess weight on a scheduled basis, since the airline was only operating two or three schedules a month into Apple Valley, the resultant monthly charge would have been de minimis - eleven or sixteen and one-half dollars per month on the basis of fifty cents per thousand pounds above

25,000 pounds at the level of 36,000 pounds certified weight of an F-27A aircraft for 2 or 3 schedules per month.

II

THE CONDUCT OF APPELLANT AT AND AFTER THE MEETING OF APRIL 22, 1960, CLEARLY AMOUNTED TO A WAIVER OF EXCESS WEIGHT CHARGES.

It is, of course, obvious that the agreement reached at the meeting of April 22, 1960, was not to pay excess weight charges on any basis, but rather that in the event that Apple Valley Co. decided to assert its rights under any interpretation of this clause in the lease, it would notify Bonanza so that Bonanza could take appropriate steps to protect itself by securing the approval of the governmental agencies which regulated air carriers to curtail or discontinue service. In this instance, failure to notify amounted to a notification that the provisions of this clause of the lease were not going to be enforced by Apple Valley Co., and this indeed was the case. It is undisputed that Apple Valley Co. allowed Bonanza to institute F-27A service in June of 1960, and that such service was continued to the end of the term of the lease without any claim for excess weight charges. It is undisputed that after the first claim for such charges, long after the lease had expired, in February of 1964, Apple Valley Co. accepted the space rental and landing fee checks computed without regard to

excess weight provisions of the lease. It is also undisputed that Apple Valley Co. never accrued any liability for excess weight charges, even after Bonanza had terminated its tenancy with Apple Valley Co.

Under these undisputed facts, the Trial Court applied the law as enunciated in the case of Bettelheim v. Hagstrom Food Stores, Inc., 113 Cal. App. 2d 873, 249 P. 2d 301 (1952), a case on all fours with the case at bar. In that case the plaintiff-lessor had entered into a three-year sublease with the defendant-lessee which provided for a rental of 2% of defendant's gross receipts, with a minimum monthly rental of \$500. The lease also contained a provision that any holding over would be deemed a month-to-month tenancy at a monthly rental of no less than an amount equal to 5% of the gross receipts with the same minimum rental. A short time before the lease expired, plaintiff's agent and defendant's president had at least four conversations regarding a new lease wherein defendant indicated it would be willing to stay under the same terms and conditions it had during the three year period and would remain in possession only on those terms because of parking conditions. Plaintiff's position was unclear and certainly it did not agree specifically to allow defendant to continue on the old basis; its agent stated that it was primarily interested in getting defendant to take over either a portion or all of the time left in the master lease. No new lease was executed. Defendant held over for eight months beyond the term of the

lease and made the rental payments for the holding over period by check in the same manner it had during the original lease and according to the terms thereof. Plaintiff sued for the additional 3% of the gross receipts for the eight month hold-over period. The Appellate Court indicated that although there was no agreement, either express or implied, to let the defendant continue on under the old terms and that although the most that was done in this respect was to acquiesce in its remaining in possession without any agreement as to the terms, plaintiff was estopped from asserting any claim for rental in excess of the amounts received. This was because plaintiff's knowledge of the facts and acceptance of the payments and acquiescence in defendant's continued occupancy of the premises induced defendant to remain during the hold-over period. It might be noted that the Court came to this conclusion despite the fact that there were two "no waiver" clauses in the lease.

Section 2076 of the California Code of Civil Procedure provides as follows:

"The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument or property, or he must be deemed to have waived it; and if the objection to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires or be precluded from

objecting afterwards."

See also Julian v. Gold, 214 Cal. 74, 3 P.2d 1009; Sinnige v. Oswald, 170 Cal. 55, 148 Pac. 203; Taylor v. Taylor, 39 Cal. App. 2d 518, 103 P. 2d 575; California Evidence Code §636; Cowell v. Snyder, 15 Cal. App. 634, 115 Pac. 961; and Colyear v. Tobriner, 7 Cal. 2d 734, 82 P. 2d 741.

In Cowell v. Snyder, *supra*, a tenant for years held over after having been seasonably notified that the rent would be raised if there was to be a hold-over. It was said that if the tenant does not refuse to be bound by such new terms, by his silence he will be deemed to have acquiesced in the changed contract and become bound. However, if he refuses to pay an increased rental, he becomes a trespasser and liable for reasonable rental value in damages. Then if the landlord accepts rental as tendered without the increase, the landlord is bound for the new period.

After proper notice to pay rent or quit, a tenant becomes a tenant at sufferance and he is liable for the reasonable value of the use, or perhaps for the rate of rent paid during the term. Colyear v. Tobriner, 7 Cal. 2d 735, 62 P. 2d 741, 745. Of course the tenancy at sufferance under the rule of the Cowell and Colyear cases, *supra*, only obtains if "reasonable" notice is given by the landlord to the tenant that the rent will be raised. No such notice was given herein. The lease ran its course to July 1, 1962, with no action on the part of appellant at that time or thereafter to

assert its known rights. The conduct of appellant from and after June 1, 1960, can only be construed as a waiver calculated to keep a valuable tenant in possession. It succeeded in this strategy until November 1965. Then, and only then, it brought this suit, even though a substantial portion of its claims was barred by the statute of limitations. Appellant's conduct speaks for itself. So held the Trial Court.

CONCLUSION

There is no material dispute as to the facts in this case. Appellant's affidavits, by asserting a lack of recollection, do not controvert the specific factual affidavits of appellee in any material regard. Appellant, by its conduct at and after the meeting of April 22, 1960, intended to and did waive its right to receive excess weight fees. The judgment of the Trial Court should be affirmed.

Respectfully submitted,

MAXWELL & SHEAHAN
ARTHUR M. TAYLOR

By CLYDE R. MAXWELL

Attorneys for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Clyde R. Maxwell

CLYDE R. MAXWELL

No. 22614

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APPLE VALLEY BUILDING AND DEVELOPMENT CO., INC.,

Appellant,

vs.

BONANZA AIR LINES, INC.,

Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

JUL 8 1968

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APPELLANT'S REPLY BRIEF.

I.

The Apple Valley Affidavits Raise a Substantial Issue of Fact as to Whether There Was an Agreement to Modify the Excess Weight Charge as Contended by Bonanza.

A. When a Witness Is in a Position to Know Whether or Not an Event Occurred, His Testimony That He Has No Recollection of the Event Is Sufficient to Raise an Issue of Fact.

The cases cited by Bonanza for the proposition that the statement of a witness to the effect that he has "no recollection" is not sufficient to create a conflict in the evidence are not relevant here or do not support Bonanza's position.

The Idaho, New York, Missouri, Iowa, Maryland and Nebraska cases may be disregarded without reference to whether they hold as Bonanza contends.¹

¹These cases are cited at pages 13 and 14 of Bonanza's brief, and are as follows: *Idaho Mercantile Co. v. Kalanquin*, (1901)
(This footnote is continued on the next page)

This is a diversity case, and so is governed either by Rule 43 or the case-made law in diversity cases. Rule 43 of the Federal Rules of Civil Procedure favors the admissibility of evidence. The evidence is admissible under either the federal law or the law of the state of the forum, whichever is more liberal. In diversity cases the substantive law of the state of the forum controls. Burden of proof is considered a substantive question. (*Asheim v. Pigeon Hole Parking Inc.*, (9th Cir. 1960) 283 F. 2d 288, 290; *Peterson v. Mountain States Telephone & Telegraph Co.*, (9th Cir. 1965) 349 F. 2d 934, 936). Therefore, under either view the applicable rule is governed either by federal or California law.

The only federal case we have found which is in point is *Eiseman v. Pennsylvania R. Co.*, (3rd Cir. 1945) 151 F. 2d 222. That case holds that testimony of a witness that he does not recall something which he was in a position to see or hear if it did happen, raises a conflict in the evidence as to whether the event occurred. The issue in *Eiseman* was whether a warning bell had been ringing. A witness named Buckson was asked, "You would not know whether the bell was ringing or not? You have no recollection?" He answered, "I have no recollection, and I can't say." The court said:

"The issue of fact presented by this evidence and Buckson's earlier evidence that if the bell had been rung he 'probably' would have heard it was for the jury."

8 Idaho 101 [66 Pac. 933]; *H. Herrmann Lumber Co. v. Bjurstrom*, (1911) 74 Misc. Rep. 93 [131 N.Y.S. 689]; *Inman's Administratrix v. United Rys. Co. of St. Louis*, (1911) 157 Mo. App. 171 [137 S.W. 3]; *Eckhart v. Century Fire Insurance Co.*, (1910) 147 Iowa 507 [124 N.W. 170, 171]; *Title Guarantee and Surety Co. v. Poe*, (1921) 138 Md. 446 [114 Atl. 41]; *Railsback v. Patten*, (1892) 34 Neb. 490 [52 N.W. 277].

The federal case cited by Bonanza (*Port of Palm Beach District v. Goethals*, (5th Cir. 1939) 104 F. 2d 706) is not in point.² In that case the issue was whether the corporate seal had been attached to a corporate document. The Corporate Commissioners testified that they did not remember the details. It was admitted that the document was signed. The court did not rule as to whether the failure to remember details was a sufficient denial with respect to the affixing of the seal. It held that the seal was immaterial because the signature was sufficient.

The California law permits a witness to qualify his statement in almost any conceivable manner. The evidence is always admitted and the equivocal nature of it only goes to its weight. See, for example: *People v. One 1949 Ford Tudor Sedan*, (1952) 115 Cal. App. 2d 157, 162 [251 P. 2d 776] (“probably”); *People v. Sandoval*, (1953) 119 Cal. App. 2d 777, 781 [260 P. 2d 153] (“I guess”, “I think”, “to the best of my recollection”); *People v. Miller*, (1955) 134 Cal. App. 2d 792, 794 [286 P. 2d 415] (“I believe”); *People v. Chambers*, (1958) 162 Cal. App. 2d 215, 218-219 [328 P. 2d 236] (“did not believe”); *Weingetz v. Cheverton*, (1951) 102 Cal. App. 2d 67, 72-73 [226 P. 2d 742] (“I presume”).

The only California case we have found involving the term “failure to recall” is *Griffith v. San Diego College of Women*, one of the cases cited by Bonanza.³ Bonanza cites only the opinion of the District Court of Appeal (280 P. 2d 203). That opinion set aside a

²Bonanza’s Brief, page 13.

³Bonanza’s Brief, page 13.

judgment affirming an award of arbitration. One of the grounds was that there was a dispute over whether a certain promise had been made by one of the arbitrators. The affidavits denying the promise said that the affiants had no recollection of the promise, and the District Court of Appeal held that this was not a sufficient denial. Thereafter, however, the Supreme Court granted a hearing and affirmed the trial court's judgment. In other words, the opinion of the District Court of Appeal was reversed. (*Griffith v. San Diego College of Women*, (1955) 45 Cal. 2d 501 [289 P. 2d 476].) The opinion of the District Court of Appeal is informative in disclosing the issues involved in the case, but it is not a precedent of any kind because of the granting of the petition for hearing by the Supreme Court. As was said in *Knouse v. Nimocks*, (1937) 8 Cal. 2d 482, 484 [66 P. 2d 438], in connection with the effect of the granting of a petition for hearing:

“—that opinion and decision are of no more effect as a judgment or as a precedent to be followed in the decision of legal questions that may hereafter arise as if they had not been written.”

The only other California case cited by Bonanza is *Reid v. Holcomb*, (1923) 63 Cal. App. 89, 93-94 [218 Pac. 76], and that case is not in point.⁴ One of the issues was whether a letter had been delivered to four defendants. The plaintiff's evidence showed that the letter was properly addressed and posted by registered mail, and that a receipt for it had been signed

⁴Bonanza's Brief, page 13.

by the office boy for the four defendants. Three of the four defendants positively denied receiving the letter. The fourth said that he did not remember seeing it. The court held that there was a presumption of delivery under California Code of Civil Procedure §1963, sub. 20 and 24, which are statutory presumptions that the ordinary course of business has been followed, and that a letter duly directed and mailed has been received. The point decided in the case is not whether the fourth defendant's denial was sufficient. The other three positively denied receipt of the letter. The point decided was that delivery to the office boy was proved and not contradicted by the defendants' denials that they themselves did not see the letter.

B. The Apple Valley Affidavits Deny That There Was an Oral Agreement to Modify the Lease.

If it is assumed that the law is as contended by Bonanza, that mere failure to recall an event is not a denial of it, the evidence does not support Bonanza's position. Apple Valley's affidavits do not merely say that the witnesses do not recall the meeting. The Apple Valley affidavits deny that there was any oral agreement to modify the lease.

William Sawyer said:

"I have no recollection of having attended any meeting on April 22, 1960, in the company of Ralston Hawkins, Louis Arpin, William Barris, nor anyone else." [Clk. Tr. p. 223, lines 16-20].

Let us assume that this is not a sufficient denial that there was a meeting on April 22, 1960, and that there

may have been a meeting. The important thing is whether there was any discussion of the excess weight landing fee. As to this Sawyer is positive that there never was any such discussion. He said:

“I did not ever discuss the excess weight landing fee provision of the Apple Valley Airport Lease with Bonanza representatives.” [Clk. Tr. p. 223, lines 12-14].

William Barris was similarly positive as to their being no conversation of the type claimed by Bonanza. Barris, like Sawyer, said he did not recall any meeting, but he added that:

“I did not have anything whatever to do with the negotiations of lease terms for the Apple Valley Airport before January 26, 1965.” [Clk. Tr. p. 213, lines 21-23].

Each of these affidavits raises a substantial issue of fact. Bonanza claims that Sawyer and Barris agreed to a reduction of the excess weight charge. Sawyer said that he never discussed the excess weight charge. Barris said he had nothing to do with lease negotiations prior to 1965.

II.

The Evidence Does Not Show a Waiver of the Excess Weight Charge

Bonanza apparently claims that Apple Valley's acceptance of rent without claiming the excess weight charge is a waiver as a matter of law. The cases cited by Bonanza do not support such a contention. Waiver or estoppel in some cases may be inferred from failure to assert a right, but this inference cannot be drawn

as a matter of law from this fact alone on a motion for summary judgment.⁵ None of the cases cited by Bonanza holds that there is a waiver or estoppel as a matter of law on such evidence.

In *Bettelheim v. Hagstrom Food Stores*, (1952) 113 Cal. App. 2d 873, 878 [249 P. 2d 301],⁶ the court affirmed a judgment after trial where estoppel had been found by the trial court. But the necessity to try the issue was clearly recognized, and it was expressly held that the trial court could have found there was no estoppel. The court said:

“While a contrary conclusion might have been drawn, such a conclusion is not inevitable or the only reasonable one. In such event we are bound by the conclusion drawn by the trial court.”

In *Julian v. Gold*, (1931) 214 Cal. 74 [3 P. 2d 1009],⁷ the trial court found that a lessor and lessee orally agreed to reduce the rent, and that the lessor accepted the lower amount according to the oral agreement, but held that the lessor was still entitled to recover the rent specified in the lease because the agreement was not in writing and not supported by consideration. The judgment was reversed because the oral agreement had been executed and was therefore valid. In the case now under consideration there is an issue of fact as to whether there was an oral agreement, and Bonanza's rent payments, as well as its contention

⁵In our opening brief it was shown that there is evidence explaining the failure to claim the charge earlier (Appellant's Op. Br. pp. 11-13); and that even Bonanza's evidence is subject to the construction that there was no waiver (Appellant's Op. Br. pp. 18-21).

⁶Bonanza's Brief, page 16.

⁷Bonanza's Brief, page 18.

of waiver, are not in accord with its claim of an oral agreement. Bonanza claims there was an oral agreement to reduce the excess weight charge. It does not claim there was an agreement to waive it entirely. Bonanza did not pay or tender even the reduced amount which it claims was agreed to.

Sinnege v. Oswald, (1915) 170 Cal. 55 [148 Pac. 203]⁸ is authority against Bonanza's position. A lease provided for rent in the amount of \$347 per month. For a period of time the lessee paid and the lessor accepted \$317 per month. There was no dispute about these payments that were accepted. The lessor then sued for two payments of \$347 which had not been paid at all, and by supplemental complaint for a third payment of \$347. The lessee contended (as Bonanza does here) that the rental rate had been reduced by the prior acceptance of lower payments. The trial court gave judgment for the full amount claimed, namely, three months at \$347 per month. The Supreme Court affirmed, but reduced the judgment by one-half month's rent to a total of \$867.50, pursuant to a stipulation to do so because the tenant had moved out during the third month.

Taylor v. Taylor, (1940) 39 Cal. App. 2d 518 [103 P. 2d 575],⁹ also does not support Bonanza's position. In that case a property settlement agreement provided that the husband would advance \$100 per month to the wife, and that he would account to her for one-half of the income from certain real property, less the \$100 advanced. Over a period of years the husband ad-

⁸Bonanza's Brief, page 18.

⁹Bonanza's Brief, page 18.

vanced various amounts to the wife which were sometimes less than \$100 per month, and various accounts were settled regarding the income. The wife then sued claiming that \$4,173.81 was due if the husband had properly accounted for income. The trial court found that nothing was due, and that the parties had modified the agreement by their conduct. The Court of Appeals affirmed only insofar as denying recovery of the amounts which had been settled by the prior accountings, but reversed the finding that the agreement had been modified. Bonanza's claim is far different. Bonanza's claim is that there was an oral agreement to reduce the excess weight charge, not that there was any agreement to waive it entirely. The alleged agreement is disputed, but regardless of that, Bonanza did not tender or pay or account in any manner for any portion of the excess weight charge.

California Evidence Code §636¹⁰ provides that "The payment of earlier rent or installments is presumed from a receipt for later rent or installments." Assuming that this code section is applicable at all (Bonanza made no later or any other excess weight charge payments), it could only raise a rebuttable presumption (Evidence Code § 630). The presumption is rebutted, not only by Apple Valley's evidence, but by Bonanza's admission that the charge has never been paid.

In *Cowell v. Snyder*, (1911) 15 Cal. App. 634 [115 Pac. 961]¹¹ the landlord notified the tenant, at the end of the term of the lease, that he would claim a higher rental if the tenant held over. The tenant notified

¹⁰Bonanza's Brief, page 18.

¹¹Bonanza's Brief, page 18.

the landlord that he would not pay the higher rental, and the landlord accepted rent at the rate specified in the lease. The trial court found that under these circumstances the lease had not been modified, and this portion of the judgment was affirmed. In our case there is an issue of fact as to whether Bonanza notified Apple Valley that it would pay the excess weight charge at a lower rate, and even if after trial a finding were made according to Bonanza's testimony, Apple Valley would be entitled to the excess weight charge at the lower rate.

In *Colyear v. Tobriner*, (1936) 7 Cal. 2d 735 [62 P. 2d 741],¹² there was a written one-year lease providing for rent at the rate of \$45 per month, with an option to renew prior to expiration of the term at "a monthly rental not to exceed a 20% increase of the present rental basis." Prior to expiration of the term, the tenant purported to exercise the option, but agreed only to pay \$45 per month. A 20% increase would amount to \$54 per month. The landlord refused to accept the exercise of the option on these terms, but permitted the tenant to remain in possession and accepted \$45 per month for a period of time. Then the landlord notified the tenant that the tenancy was terminated, and that he would demand \$750 per month if the tenant remained in possession. The trial court held that the option was not properly exercised, and gave judgment for \$750 per month for the period of possession after the landlord's notice to pay that amount.

¹²Bonanza's Brief, page 18.

The judgment was affirmed insofar as it found that the option was not exercised, but reversed for retrial on the amount of rent to be paid after the notice to pay \$750 per month. The court held that since the option was not exercised, the tenant continued at sufferance and was liable for the reasonable rental value.

The *Colyear* case is distinguishable, not only because it is a disputed issue of fact in our case as to whether notice was given or any agreement was made, but for the more fundamental reason that it involved the situation of a dispute as to the amount of rent after expiration of the term. Bonanza's sole contention is that there was an agreement to modify the lease prior to expiration of the term. If Apple Valley agreed to Bonanza's proposal to accept a lesser weight charge, the lease would be so modified. If Bonanza merely notified Apple Valley that it wanted to pay a lesser weight charge and Apple Valley did not agree (and that is really all that Bonanza's evidence shows at best) the lease would not be modified. In either event, upon expiration of the term, Apple Valley would be entitled to the rent provided in the lease because Bonanza held over with Apple Valley's consent. The rule to be applied in this situation is found in *Shenson v. Shenson*, (1954) 124 Cal. App. 2d 747, 753 [269 P. 2d 170]. The rule is that if the tenant holds over without consent of the landlord, he is liable for reasonable rental. That is the case of *Colyear v. Tobriner*. But if the holding over is with consent, it is presumed that the

tenancy resulting from the holding over is on the same terms as the original lease. That is the case of *Shenson v. Shenson*, and is the rule which governs here. The sole question here is whether there was a modification of the lease. Whatever the finding is on that issue, the legal rights and liabilities of the parties follow as a matter of law. Apple Valley is entitled to the excess weight charge, either as written in the lease or in a lesser agreed amount if there was an agreement.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH D. MULLENDER, JR.

